No. 06-5247
Title: John Francis Fry, Petitioner
v.
Cheryl K. Pliler, Warden
Docketed: July 17, 2006
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (04-16876)
Decision Date: February 2, 2006
Rehearing Denied: April 25, 2006
Questions Presented

| ~~Date~~ | ~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Jun 20 2006 | Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 16, 2006) |
| Aug 31 2006 | DISTRIBUTED for Conference of September 25, 2006. |
| Sep 1 2006 | Response Requested . (Due October 2, 2006) |
| Sep 26 2006 | Order extending time to file response to petition to and including November 1, 2006. |
| Oct 26 2006 | Brief of respondent Cheryl K. Pliler, Warden in opposition filed. |
| Nov 7 2006 | Reply of petitioner John Francis Fry filed. (Distributed) |
| Nov 8 2006 | DISTRIBUTED for Conference of November 21, 2006. |
| Nov 27 2006 | DISTRIBUTED for Conference of December 1, 2006. |
| Dec 4 2006 | DISTRIBUTED for Conference of December 7, 2006. |
| Dec 7 2006 | Motion to proceed in forma pauperis is granted and the petition for a writ of certiorari is GRANTED limited to Question 3 presented by the petition. |
| Dec 11 2006 | Motion to appoint counsel filed by petitioner John Francis Fry. |
| Dec 27 2006 | Motion DISTRIBUTED for Conference of January 12, 2007. |
| Jan 16 2007 | Motion to appoint counsel filed by petitioner GRANTED. Victor S. Haltom, Esquire, of Sacramento, California is appointed to serve as counsel for the petitioner. |
| Jan 17 2007 | SET FOR ARGUMENT ON Tuesday, March 20, 2007. |
| Jan 18 2007 | Joint appendix filed. |
| Jan 18 2007 | Brief of petitioner John Francis Fry filed. |
| Jan 22 2007 | Brief amicus curiae of Innocence Network filed. |
| Jan 30 2007 | Record received from U.S.C.A. for 9th Circuit. (1 envelope) |
| Feb 5 2007 | CIRCULATED. |
| Feb 7 2007 | Record received from U.S.D.C. for Eastern District of California (Sacramento). (2 boxes) |
| Feb 20 2007 | Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed) |
| Feb 22 2007 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Feb 22 2007 | Brief amicus curiae of United States filed. (Distributed) |
| Feb 22 2007 | Brief of respondent Cheryl K. Pliler, Warden filed. (Distributed) |
| Feb 22 2007 | Brief amici curiae of Missouri, et al. filed. (Distributed) (TO BE RECOVERED). |
| Mar 5 2007 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| Mar 12 2007 | Reply of petitioner John Francis Fry filed. (Distributed) |

Mar 20 2007 ARGUED. For Petitioner: Victor S. Haltom, Sacramento, California (30 minutes; Appointed by this Court). For respondent: Ross C. Moody, Deputy Attorney General, San Francisco, California (20 minutes); and Patricia A. Millett, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (10 minutes - for United States, as amicus curiae, supporting respondent).

06-5247

Supreme Court, U.S.
FILED
JUN 20 2006
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# In the Supreme Court of the United States

No. _____

**JOHN F. FRY**, PETITIONER

*v.*

**CHERYL K. PLILER**, Warden, RESPONDENT

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***ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT***

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## PETITION FOR A WRIT OF CERTIORARI

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ORIGINAL

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## QUESTIONS PRESENTED

1. Can a trial court's unconstitutional exclusion of *reliable* evidence of third party guilt be deemed harmless error?

2. This Court's decisions in *Holmes v. South Carolina* ___U.S.___, 164 L.Ed.2d 503, 126 S.Ct. 1727 (2006), and *House v. Bell*, ___U.S.___, 2006 U.S. Lexis 4675 (2006), were handed down after the decision of the Ninth Circuit below. Should this Court issue a GVR order in this case, directing the Ninth Circuit to reconsider its decision that the unconstitutional exclusion of *reliable* evidence of third party guilt can be harmless, in light of *Holmes* and *House*?

3. If constitutional error in a state trial is not recognized by the judiciary until the case ends up in federal court under 28 U.S.C. § 2254, is the prejudicial impact of the error assessed under the standard set forth in *Chapman v. California*, 386 U.S. 18 (1967), or that enunciated in *Brecht v. Abrahamson*, 507 U.S. 619 (1993)? Does it matter which harmless error standard is employed? And, if the *Brecht* standard applies, does the petitioner or the State bear the burden of persuasion on the question of prejudice?

## LIST OF PARTIES

Petitioner, John Francis Fry, is represented by Victor S. Haltom, Esq., of Sacramento, California.

Respondent, Cheryl Pliler, a warden in the California Department of Corrections, is represented by Deputy Attorney General Ross C. Moody, of San Francisco, California.

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# In the Supreme Court of the United States

No. _____

**JOHN F. FRY**, PETITIONER

*v.*

**CHERYL K. PLILER**, Warden, RESPONDENT

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***ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT***

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## PETITION FOR A WRIT OF CERTIORARI

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John F. Fry, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals, see App., *infra*, 1a - 5a, is unreported, but is available on line at *Fry v. Pliler*, 2006 U.S. App. Lexis 2694 (CA9 2006). The order of the court of appeals denying Mr. Fry's petition for rehearing and suggestion for rehearing en banc, see App., *infra*, 6a, is unreported.

The memorandum of findings and recommendations prepared by the magistrate judge, see App., *infra*, 8a-72a, which was adopted in full by the district court, see App., *infra*, 73a-74a, is unreported.

## JURISDICTION

The opinion of the court of appeals was issued on February 2, 2006. App. 1a. The order of the court of appeals denying Mr. Fry's petition for rehearing was entered on April 25, 2006. App. 6a. The judgment of the court of appeals was filed on May 5, 2006. App. 7a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

Article VI of the Constitution provides, in pertinent part, that the "Constitution ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby...."

The Compulsory Process Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor...."

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law...."

## STATEMENT

This case raises questions concerning the reach of the harmless error rule, and whether the rule may be applied so as to allow a defendant's criminal

conviction to remain in tact following a trial in which *reliable* evidence of a third person's confession to the charged crime was unconstitutionally excluded.

Every federal judge who has considered Mr. Fry's case has concluded that the state judge who presided over Mr. Fry's third jury trial committed constitutional error by excluding *reliable* evidence of another man's confession to the double homicide for which Mr. Fry is now serving a sentence of life imprisonment without the possibility of parole. App. 2a, 4a, 53a-54a, 73a-74a.

No court has ever held, in a published case, that a trial court's unconstitutional exclusion of *reliable* evidence of a third person's confession to the crime a defendant has been convicted of committing is harmless error. Yet, such a conclusion was reached in the unpublished 2-1 panel decision by the Ninth Circuit below. App. 1a-5a. The ultimate question in this case is whether this result constitutes a constitutionally permissible application of the harmless error doctrine.[1]

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[1] Although the harmless error doctrine is not expressly set forth in the Constitution, the question of whether a constitutional violation may be deemed harmless is a federal constitutional question: "Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Chapman v. California*, 386 U.S. 18, 21 (1967).

### A. Basis for Jurisdiction in the Lower Courts

This is a habeas case brought in federal court by a state prisoner. The district court had jurisdiction pursuant to 28 U.S.C. § 2254. The court of appeals had jurisdiction of the appeal pursuant to 28 U.S.C. § 2253(a).

### B. Procedural Background

Mr. Fry was tried by jury three times in the Superior Court of California, in Solano County, on two counts of murder. See California Penal Code § 187. The first two jury trials ended in mistrials due to juror deadlock. App. 1a, 4a, 12a-13a, 45a, 54a, 108a.[2] Mr. Fry was convicted of both counts of murder in the third trial, after the third jury had deliberated for five weeks and had once declared itself to be deadlocked. App. 1a, 4a, 8a, 13a-14a, 45a, 54a, 61a-66a.[3] Mr. Fry was sentenced to imprisonment for life without the possibility of parole. App. 9a, 75a.

### C. The Underlying Facts

Shortly after 6:00 a.m., on October 27, 1992, the bodies of James and Cynthia Bell were found in a vehicle parked on a dirt shoulder next to a highway in northern California. They had both been shot to death. App. 14a.

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[2] The jury in the first trial was divided 6-6. The jury in the second trial was split 7-5. App. 13a-14a.

[3] The jury in the third trial had declared itself to be split 7-5. App. 14a.

There was evidence which linked Mr. Fry to the double homicide: Mr. Fry frequently sold methamphetamine to Cynthia Bell, and at the time of her death, she was in debt to him. App. 25a, 46a. There was witness testimony that Mr. Fry was upset about this debt and that he had threatened to kill Ms. Bell. App. 18a, 20a, 25a, 29a. Witnesses described seeing a vehicle similar to Mr. Fry's near the crime scene shortly before the Bells' bodies were discovered. App. 77a, 94a. Certain witnesses, including Mr. Fry's brother, testified that Mr. Fry admitted killing the Bells. App. 24a, 27a.[4] A criminalist called by the prosecution testified that a gun owned by Mr. Fry was the murder weapon. App. 90a.

However, there was also evidence that someone else committed the double homicide: A disinterested eye-witness from Missouri, who was driving a commercial truck, testified that he saw the shootings occur, and that Mr. Fry was not the shooter. App. 29a, 45a.[5] An employee of the business at which the truck driver subsequently made a delivery testified that the truck driver looked like he

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[4] However, Mr. Fry's brother admitted that he had been threatened by police in connection with this case. App. 44a. Further, Mr. Fry and his brother are not fond of one another. App. 44a.

[5] At the time of the double homicide, Mr. Fry was 6'2", weighed 300 pounds, and was bald. See pages 427, 436-438, 519-520 of the Excerpt of Records in proceedings below in Ninth Cir. Case no. 04-16876. According to the truck driver, the shooter had a full head of hair and was "half the size" of Mr. Fry — approximately 5'6" to 5'8" and 140 pounds. App. 99a-100a.

had seen "a ghost" and that he was "very distraught." App. 108a. A number of witnesses testified that another man, Anthony Hurtz,[6] had confessed to killing the Bells. App. 45a, 53a, 103a-106a.[7] Additionally, shortly before the Bells were killed, a witness overheard the Bells talking on a pay phone, trying to get in touch with "Leroy." App. 16a-17a, 78a Mr. Hurtz goes by the nickname "Leroy." App. 103a-104a. Also, a friend of Mr. Hurtz's was in possession of Mr. Fry's gun after the homicides. App. 57a. A defense ballistics expert, who the prosecutor conceded to be credible,[8] testified that Mr. Fry's gun could not be identified as the murder weapon. App. 94a. Finally, as to the prosecution witnesses who testified that Mr. Fry had confessed, the defense introduced evidence that they had been threatened and coerced by law enforcement, or were otherwise unreliable. App. 24a-34a.[9]

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[6] Mr. Hurtz is a drug dealer. App. 45a.

[7] However, the prosecution was able to introduce evidence concerning the bias of each of these witnesses. For example, two were estranged girlfriends of Mr. Hurtz. App. 104a-106a.

[8] See page 5109 of the Reporter's Transcript of trial proceedings, which has been lodged with the district court in Eastern District of Calif. docket no. CV-01-01580-FCD-GGH-P.

[9] For example, one of the witnesses was a notorious "jailhouse snitch," App. 48a, 88a-90a, 98a, and law enforcement had threatened to cause another of the witnesses to lose custody of her small children if she did not testify against Mr. Fry. App. 30a.

The trial court refused to allow Mr. Fry to present to the jury the testimony of the only known unbiased witness who heard Mr. Hurtz confessing to the murder of the Bells. App. 45a-54a, 150a-159a. This witness was Mr. Hurtz's cousin, Pamela Maples. App. 4a-5a, 48a-49a, 52a, 151a. Ms. Maples had "overhear[d] large portions of a conversation ... in which [Mr.] Hurtz indicated that he had committed a double homicide." App. 2a. "[T]he portions of the conversation [Ms.] Maples did hear involved idiosyncratic facts exactly matching the facts surrounding the murder of Cynthia and James Bell...." App. 2a, 52a-53a. Nevertheless, the trial court concluded that there was an insufficient foundation upon which to base a finding that the double murder Ms. Maples heard Mr. Hurtz describing was the double murder with which Mr. Fry was charged. App. 49a, 159a. Hence, the jury never received the evidence.

**D. Direct Review in State Court**

Following his conviction, Mr. Fry appealed to the California Court of Appeal, First Appellate District. In the course of that appeal, Mr. Fry presented a number of assignments of error, including a claim that the trial court had violated his constitutional rights by excluding Ms. Maples' proffered testimony regarding her cousin's confession to the double homicide. App. 129a-131a. The state appellate court not only failed to recognize that the trial court's exclusion of this

evidence of third party guilt was constitutional error, but also failed to recognize that the ruling was erroneous under any standard. App. 45a-54a, 129a-131a. The court also stated in a footnote that "no possible prejudice" could have resulted from the exclusion of Ms. Maples' testimony, because evidence concerning other confessions made by Mr. Hurtz was presented to the jury;[10] the court did not cite to any authority in this regard, and did not otherwise indicate the standard under which it was assessing possible prejudice. App. 50a-51a, 131a.[11] The state appellate court affirmed Mr. Fry's conviction. App. 143a.

Mr. Fry petitioned to the California Supreme Court for discretionary review. However, the court denied the petition. App. 13a.

**E. § 2254 Proceedings in the District Court**

Mr. Fry filed a habeas petition in the United States District Court, Eastern District of California, pursuant to 28 U.S.C. § 2254. The case was referred to a

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[10] However, the state appellate court felt that the witnesses who testified to these other confessions by Mr. Hurtz "lacked credibility, either because they had personal motives rendering them hostile to ... [Mr. Hurtz] or biased in favor of [Mr. Fry]." App. 113a.

[11] The court quite clearly did not consider prejudice under the *Chapman* standard. Indeed, the court did not even address the constitutional component of Mr. Fry's claim, analyzing the issue solely under state law principles. App. 49a-50a. As this Court recognized in *Chapman v. California*, 386 U.S. 18, the California judiciary applies a "reasonably probable" harmless error standard in cases involving non-constitutional error — a standard which is inadequate to safeguard infringements of a defendant's constitutional rights. *Id.* at 24.

magistrate judge. See 28 U.S.C. § 636; Rule 10 of the Rules Governing Section 2254 Cases in the United States District Courts. The magistrate judge issued a 65-page memorandum of findings and recommendations. App. 8a-72a. At the outset of his memorandum of findings and recommendations, the magistrate judge stated that Mr. Fry had come "close to demonstrating actionable error in some of his various claims...." App. 8a. The magistrate judge also characterized this case as "a difficult case." App. 71a. As to the state trial court's exclusion of Ms. Maples' testimony, and as to the state appellate court's affirmance of the ruling, the magistrate judge concluded that these decisions were violative of Mr. Fry's Sixth and Fourteenth Amendment rights, and constituted unreasonable applications of this Court's precedent. App. 52a-53a (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967)). The magistrate judge noted that Ms. Maples' proffered testimony was "reliable," and that the State had conceded that Ms. Maples "was the only third party culpability witness who had no apparent bias." App. 52a-53a.

In the final analysis, however, the magistrate judge concluded that the constitutional transgression did not warrant the granting of federal habeas relief.

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In this regard, the magistrate judge stated:

> "While this court cannot conclude, as did the state appellate court[,] that 'no possible prejudice' could have ensued as a result of the exclusion of the testimony, the court does find that there has been an insufficient showing that the improper exclusion of the testimony of Ms. Maples had a substantial and injurious effect on the jury's verdict."

App. 54a-55a.

The district court adopted in full the findings and recommendations of the magistrate judge. App. 73a-74a.

**F. Proceedings in the Court of Appeals**

On appeal, Mr. Fry's conviction was left in tact by a divided panel of the Ninth Circuit. App. 1a-5a. The panel majority recognized that the state judge who presided over Mr. Fry's third jury trial erroneously excluded "reliable" evidence that somebody else confessed to the murder Mr. Fry has been convicted of committing. App. 2a. Although the panel majority concluded that the trial court's exclusion of the reliable third party culpability evidence constituted an objectively unreasonable application of clearly established federal law, and that the evidence "would have substantially bolstered [Mr.] Fry's claim[] of innocence[,]" the panel majority concluded that the error was harmless under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). App. 2a-3a (internal quotation marks and brackets omitted).

However, aside from quoting the "substantial and injurious effect" test of *Brecht*, the panel majority did not state why or how it deemed the exclusion of the "reliable" evidence of a third party's confession to be harmless. App. 2a-3a.

Adhering to circuit precedent, the panel majority rejected Mr. Fry's argument that the prejudice inquiry in this case should have been conducted under *Chapman* rather than *Brecht*, in light of the state appellate judiciary's failure to conduct any prejudice review under *Chapman*. App. 3a (citing *Bains v. Cambra*, 204 F.3d 964, 976 (CA9 2000)).

According to the dissenting member of the panel, the "record as a whole militates in favor of a conclusion that exclusion" of the third party confession "substantially and injuriously affected the jury's verdict in this case." App. 4a. In her dissenting opinion, Judge Rawlinson offered the reasons for her conclusion in this regard: "[T]his was John Fry's third trial, with the two prior juries having failed to reach a verdict. In this third trial, even in the absence of [the excluded] exculpating testimony, the jury deliberated for five weeks before convicting [Mr.] Fry." App. 4a. Pamela Maples, who would have testified that she heard her cousin confessing to the crime, "was the only unbiased witness presented by either side." App. 4a. "Such testimony is generally recognized as having a powerful impact on jurors." App. 4a-5a (citing *Skipper v. South Carolina*, 476 U.S. 1, 8

(1986)). Thus, Judge Rawlinson was "convinced that the exclusion of Ms. Maples' testimony was not harmless...." App. 5a.

The opinion of the panel majority contained no response to Judge Rawlinson's reasoning in this regard.

Mr. Fry filed a petition for rehearing en banc. The petition was denied in a 2-1 decision. App. 6a.

## REASONS FOR GRANTING THE PETITION

The unpublished 2-1 panel decision of the Ninth Circuit in this case allows Mr. Fry's conviction and life sentence to remain in tact notwithstanding the fact that the conviction occurred in a trial in which *reliable* evidence of a third person's confession to the charged crime was unconstitutionally excluded. App. 1a-5a. This unprecedented and unjust result cannot stand.

Treating the unconstitutional exclusion of *reliable* evidence of third-party guilt as harmless is illogical and does not comport with this Court's precedent.

Evidence of third-party guilt is necessarily exculpatory. If admitted and credited, such evidence will ineluctably lead to the acquittal of the defendant. However, if such evidence is improperly excluded, a reviewing court, rather than the finder of fact, must assess the impact of the erroneous exclusion of the

evidence.[12] If the reviewing court deems the evidence *reliable*, the reviewing court cannot rationally or lawfully treat the impact of the error as harmless.

It seems nigh oxymoronic to characterize the erroneous exclusion of "*reliable*" evidence of a third person's confession as harmless. Indeed, such evidence is perforce exculpatory. And, if it is reliable, i.e. something "in which reliance or confidence may be put; trustworthy, safe, sure[,]" see XIII Oxford English Dictionary at 562 (2d ed. 1989), its exclusion cannot rationally be treated as anything other than an outcome-influencing event.

This Court's cases demonstrate that the exclusion of competent, exculpatory defense evidence is unconstitutional. *Holmes v. South Carolina* ___U.S.___, 164 L.Ed.2d 503, 126 S.Ct. 1727 (2006); *Rock v. Arkansas*, 483 U.S. 44 (1987); *Chambers v. Mississippi*, 410 U.S. 284; *Washington v. Texas*, 388 U.S. 14.[13]

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[12] Constitutional error if this ilk violates the Compulsory Process Clause of the Sixth Amendment. *Washington v. Texas*, 388 U.S. 14. And, there is precedent to support the proposition that "[a] violation of the Compulsory Process Clause is subject to harmless error analysis." 34 Geo. L.J. Ann. Rev. Crim. Proc. 623 & n. 1991 (2005) (citing *Crane v. Kentucky*, 476 U.S. 683, 690-691 (1986); and collecting other cases). This type of constitutional error also violates the Due Process Clause of the Fourteenth Amendment. *Chambers v. Mississippi*, 410 U.S. 284; *Washington v. Texas*, 388 U.S. at 23-25 (Harlan, J., concurring).

[13] In *Taylor v. Illinois*, 484 U.S. 400 (1988), this Court explained: "The right of the defendant to present evidence 'stands on no lesser footing that the other Sixth Amendment rights we have previously held applicable to the States.'" *Id.*, at 409 (quoting *Washington v. Texas*, 388 U.S. at 18). In this connection, the First Circuit has observed: "If the ... cases of *Washington v. Texas*, [388 U.S. 14], and *Chambers v. Mississippi*, [410

Moreover, implicit in these holdings is the principle that the exclusion of such evidence cannot be treated as harmless error. See *infra*, at 16-17.

In *Holmes v. South Carolina*, 164 L.Ed.2d 503, 126 S.Ct. 1727 this Court held that a state rule which precludes an accused criminal defendant from adducing evidence of third-party guilt, simply because the prosecution's evidence of guilt is strong, when viewed in isolation, deprives the defendant of """"a meaningful opportunity to present a complete defense."""" *Id.*, 164 L.Ed.2d at 509, 126 S.Ct. at 1731 (quoting *Crane v. Kentucky*, 476 U.S. at 689-690) (quoting in turn *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

The instant case presents a variant of issue considered in *Holmes*: Where it has been determined in federal habeas proceedings that a state trial court unconstitutionally excluded *reliable* evidence of third-party guilt, can the error be treated as harmless?

Additionally, this case presents a subsidiary issue concerning the proper standard under which prejudice is to be gauged in cases such as the instant case, *viz.*, § 2254 cases in which the state appellate judiciary unreasonably failed to

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U.S. 284], mean anything, it is that a judge cannot keep important yet potentially *unreliable* evidence from the jury." *Pettijohn v. Hall*, 599 F.2d 476, 481 (CA1), cert. denied, 444 U.S. 946 (1979) (emphasis supplied). *A fortiori*, a judge cannot keep important, *reliable* evidence from the jury.

recognize that federal constitutional error occurred at trial, and in which the prejudicial impact of the error accordingly has not been assessed under the exacting standard applicable to constitutional errors. The question is whether, in such cases, the *Chapman* standard or the *Brecht* standard should apply. On this point, the lower federal courts are split.[14] Also, on this point, the Ninth Circuit has not spoken with a single voice.[15]

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[14] The Second Circuit has observed that this Court has not "definitively established the proper harmless error standard to apply when a constitutional error is being evaluated for the first time on collateral review." *Santa-Madera v. United States*, 260 F.3d 133, 140 (CA2 2001), *cert. denied*, 534 U.S. 1083 (2002). And, the Second Circuit observed that "other courts addressing the issue are not in complete agreement." *Id.* Compare *Barrett v. Acevedo*, 169 F.3d 1155, 1164 (CA8 1999) ("we use the strict standard set out in *Chapman* ... where the state court has not applied the *Chapman* analysis in the first instance"); *Barber v. Johnson*, 145 F.3d 234, 237-238 (CA5) (conc. opn. of Dennis, J.) ("Federal courts cannot justify abstaining from the enforcement of an individual's constitutional rights in deference to the systemic values of finality, federalism, and comity ... unless there has been a good-faith State effort to protect constitutional rights by applying the *Chapman* standard."), cert. denied, 525 U.S. 1005 (1998), with *Hassine v. Zimmerman*, 160 F.3d 941, 950 (CA3 1998) (noting that "the Fourth, Fifth, Seventh, Tenth, and Eleventh circuits have all held that *Brecht*, rather than *Chapman*, enunciates the appropriate standard for determining whether a constitutional error was harmless in a federal habeas challenge to a state conviction or sentence regardless of the standard employed by the state courts") (internal quotation marks omitted), cert. denied, 526 U.S. 1065 (1999).

[15] Compare *Allen v. Woodford*, 366 F.3d 823, 857 n. 6 (CA9 2004) (noting that it is "unclear whether the *Brecht* ... standard or the [*Chapman*] standard applies[,] ... [that] [t]he Circuits are split on this issue, and [that] neither [the Ninth Circuit] nor the Supreme Court has directly addressed it") with *Bains v. Cambra*, 204 F.3d 964, 976 (choosing to apply *Brecht* rather than *Chapman*).

Furthermore, looking to the petitioner to establish the prejudicial impact of constitutional error, as the lower federal judiciary has done in this case, App. 55a, is at odds with this Court's precedent. *United States v. Dominguez Benitez*, 542 U.S. 74, 81 n. 7 (2004); *O'Neal v. McAninch*, 513 U.S. 432, 437-443 (1995).[16]

### A. A Trial Court's Unconstitutional Exclusion of Reliable Evidence of a Third Party's Confession to the Offense with which the Accused Is Charged Cannot Be Characterized as Harmless Error.

In all cases considered by this Court, in which reliable evidence of third party guilt was unconstitutionally excluded by trial courts, this Court has found that the error necessitated reversal. *Holmes v. South Carolina*, 164 L.Ed.2d 503, 126 S.Ct. 1727; *Chambers v. Mississippi*, 410 U.S. 284; *Washington v. Texas*, 388 U.S. 14. In these cases, this Court did not discuss whether the unconstitutional trial court rulings were prejudicial; rather, such determinations are implicit in each of the decisions. *Holmes*, 164 L.Ed.2d at 513, 126 S.Ct. at 1735 ("[T]he rule applied in this case by the State Supreme Court violates a criminal defendant's

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[16] It may be that the debate about the proper mode of harmless error review is purely academic in most cases. As Justice Scalia has observed: The "different standards of probability relating to the assessment of whether the outcome of the trial *would* have been different ... *if* omitted evidence had been included[,]" such as the standards set forth in *Chapman* and *Brecht*, represent "ineffable gradations of probability" that are "quite beyond the ability of the judicial mind (or any mind) to grasp, and thus harmful rather than helpful to the consistency and rationality of judicial decisionmaking." *United States v. Dominguez Benitez*, 542 U.S. at 86-87 (Scalia, J., concurring in the judgment) (emphasis in the original).

right to have a meaningful opportunity to present a complete defense....[¶] For these reasons, we vacate the judgment....") (internal quotation marks omitted); *Chambers*, 410 U.S. at 303 ("[U]nder the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial. [¶] The judgment is reversed...."); *Washington*, 388 U.S. at 23 ("The judgment of conviction must be reversed.").

Because most types of constitutional error can be deemed harmless in given circumstances, *Arizona v. Fulminante*, 499 U.S. 279, 306-307 (1991) (opinion of Rehnquist, C.J., for the Court), the fact that this Court reversed convictions in *Holmes*, *Chambers*, and *Washington* without any discussion of prejudice reveals that prejudice is implicit when a trial court unconstitutionally excludes reliable evidence of third party guilt. Indeed, it is self-evident that such constitutional error precludes a jury from being able to perform its function of finding the truth and making an accurate determination of guilt or innocence. See *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) ("[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence.") How can a fact-finder determine where the truth lies when facts germane to that inquiry are concealed from the fact-finder?

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In *House v. Bell*, 547 U.S. ___, 2006 U.S. Lexis 4675 (2006), this Court described the reliable and compelling nature of the type of evidence of third party guilt Mr. Fry endeavored to introduce through Ms. Maples' testimony:

> "The confession evidence here involves an alleged spontaneous statement recounted by ... [an] eyewitness[] with no evident motive to lie. For this reason, it has more probative value than, for example, incriminating testimony from inmates, suspects, or friends or relations of the accused."

*Id.* 2006 U.S. Lexis at *61.

As noted above, the panel majority in the Ninth Circuit's decision in this case expressly found Ms. Maples' proffered testimony to be "reliable[,]" and recognized that the testimony "was material and would have substantially bolstered [Mr.] Fry's claims of innocence." App. 2a (internal quotation marks and brackets omitted). The dissenting member of the panel noted that "Ms. Maples was the only unbiased witness presented by either side[,]" that she "implicated her cousin in the murder for which [Mr.] Fry was on trial[,]" and that "[s]uch testimony is generally recognized as having a powerful impact on jurors." App. 4a-5a.[17]

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[17] "A confession is like no other evidence." *Arizona v. Fulminante*, 499 U.S. at 296 (opinion of White, J., for the Court). "Certainly, confessions have profound impact on the jury...." *Id.*

Given the nature of the evidence which was kept from Mr. Fry's jury, the jury's truth-finding function was impaired to such an extent that the jury could not make a reliable determination of Mr. Fry's guilt or innocence. *Rosen v. United States*, 245 U.S. 467, 471 (1918) ("[T]he truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury...."); *United States v. Nobles*, 422 U.S. 225, 231 (1975) ("'The ends of justice would be defeated if judgments were to be founded on partial or speculative presentation of the facts.'") (quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974)).[18] Furthermore, because the excluded evidence has been found to be reliable, and because the excluded evidence exonerates Mr. Fry, the unconstitutional exclusion of the evidence cannot rationally be treated as harmless.

Finally, this Court's jurisprudence concerning the errors which are properly subject to harmless error review reveals that the type of error which occurred in

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[18] The Compulsory Process Clause was designed to ensure that the truth-finding function of juries would not be impaired in this manner. "[T]he Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury." (*Washington v. Texas*, 388 U.S. at 20.)

this case is not amenable to such review: Trial error is subject to harmless error analysis, because it is "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. at 307-308 (opinion of Rehnquist,C. J., for the Court). The error in the instant case did not occur "during the presentation of the case to the jury...." *Id.* To the contrary, the error consisted of a ruling which was made outside the presence of the jury, App. 48a, 151a-152a, and it resulted in reliable, exculpatory evidence being kept from the jury. Thus, the error cannot be "quantitatively assessed in the context of other evidence presented...." *Id.*

This petition should be granted so that this Court can definitively establish that a trial court's unconstitutional exclusion of *reliable* evidence of third party guilt is not the type of error which can be treated as harmless.

### B. A GVR Disposition May Be Warranted in Light of this Court's Recent Decisions in *Holmes* and *House*.

This Court's decisions in *Holmes v. South Carolina*, 164 L.Ed.2d 503, 126 S.Ct. 1727, and *House v. Bell*, 2006 U.S. Lexis 4675, were handed down after the Ninth Circuit's decision in this case, and after the Ninth Circuit denied Mr. Fry's

petition for rehearing en banc. The relevance of these decisions to the questions presented in this petition has been discussed above. Because of the pertinence of these new decisions to the issues presented herein, a GVR disposition may be warranted. See *Stutson v. United States*, 516 U.S. 193 (1996) (*per curiam*); *Lawrence v. Charter*, 516 U.S. 163 (1996) (*per curiam*). Indeed, in *Lawrence*, this Court explained that "intervening developments," including new Supreme Court decisions, may warrant an exercise of this Court's "GVR power[.]" 516 U.S. at 166-167.

### C. The State Appellate Court Which Affirmed Mr. Fry's Conviction on Direct Review Would Have Been Constrained to Reverse Mr. Fry's Conviction if It Had {1} Recognized that Mr. Fry's Constitutional Rights Were Violated by the Exclusion of Ms. Maples' Testimony and {2} Properly Assessed the Effect of the Constitutional Violation Under *Chapman*. It Is Unjust to Deny Federal Habeas Relief to Mr. Fry Simply Because of the State Appellate Court's Objectively Unreasonable Failure to Even Recognize the Constitutional Error.

If the state appellate court which affirmed Mr. Fry's conviction had engaged in a reasonable application of this Court's precedent, the court would have found that the exclusion of Ms. Maples' testimony violated Mr. Fry's constitutional rights. Indeed, as noted above, this is the unanimous conclusion of every federal judge who has considered this case. App. 2a, 4a-5a, 52a-54a, 73a-74a.

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Furthermore, had the state appellate court recognized this constitutional violation on direct review, the state court would have been required to apply *Chapman* harmless error analysis. *Brecht v. Abrahamson*, 507 U.S. at 636; *Chapman v. California*, 386 U.S. at 24. And, under that standard, the court would have been constrained to reverse Mr. Fry's conviction. For, the federal judges who have considered this case have not only disavowed the notion that prejudice can be ruled out as a result of the constitutional violation, App. 54a, but also they have recognized that the erroneously excluded evidence was "reliable[,]" and "would have substantially bolstered [Mr.] Fry's claims of innocence." App. 2a (internal quotation marks and brackets omitted).

The federal judges who have treated the constitutional violation in this case as harmless have done so by expressly relying on the *Brecht* standard instead of the *Chapman* standard, App. 2a-3a, 54a-55a, notwithstanding Mr. Fry's position that the latter standard is inapplicable in this case. App. 62a. Of course, the *Brecht* standard is a deferential and more forgiving standard than the *Chapman* standard. The dissenting judge in the Ninth Circuit explained that the error in this case cannot be treated as harmless even under the deferential *Brecht* standard. App. 4a-5a. And, the remarks of the magistrate judge and the panel majority make clear their view that the error could not be deemed harmless under the exacting

*Chapman* standard. App. 54a (The magistrate judge stated: "[T]his court cannot conclude, as did the state appellate court that 'no possible prejudice' could have ensued as a result of the exclusion of the testimony...."); App. 2a (The panel majority stated that the excluded testimony was "reliable" and "would have substantially bolstered [Mr.] Fry's claims of innocence.") (internal quotation marks and brackets omitted).[19]

Thus, if Mr. Fry is ultimately denied habeas relief in this case, that result will be directly attributable to the state appellate court's unreasonable application of this Court's precedent, which led to that court's failure to review the trial court's error under the *Chapman* standard. Such a result is strikingly unseemly, particularly in light of this Court's assessment in *Brecht* that *Chapman* harmless error analysis need not be applied in § 2254 proceedings due to the duty and presumed ability of state court judges to identify and vindicate violations of defendants' federal constitutional rights. *Brecht v. Abrahamson*, 507 U.S. at 636 (noting that, under Article VI, state courts have a "duty to uphold the Constitution"); *id.* ("State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*....").

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[19] This description by the panel majority of the effect the excluded testimony would have had on the case leaves one wondering how the panel majority could have found the erroneous exclusion harmless under any standard.

It has been established beyond dispute in § 2254 proceedings in this case that the judgment pursuant to which Mr. Fry is now imprisoned was obtained in derogation of Mr. Fry's constitutional rights. The core values which underlie these constitutional rights would surely be disserved by tolerating the constitutional violation simply because of a state appellate court's objectively unreasonable handling of Mr. Fry's case, and because of the principles of finality, comity, and federalism which ordinarily warrant deference in § 2254 proceedings to state court decision-making. *Brecht*, at 635.

### D. The Lower Federal Courts Improperly Allocated to Mr. Fry the Burden of Persuasion with Respect to the Question of Prejudice.

In his findings and recommendations in this case, the magistrate judge stated: "[T]he court does find that there has been an insufficient showing that the improper exclusion of the testimony of Ms. Maples had a substantial and injurious effect on the jury's verdict." App. 55a. As noted, the district court adopted the magistrate judge's findings and recommendations in full. App. 73a-74a. On appeal, Mr. Fry argued that the district court had erred by assigning the burden of persuasion to Mr. Fry in this regard. Appellant's Opening Brief at 58, Ninth Cir. case no. 04-16876.[20] However, this issue concerning the allocation of the burden

[20] The briefing of the parties below is voluminous and is not included in the appendices to this petition.

of persuasion in harmless error analysis is not addressed in the Ninth Circuit's opinion. App. 1a-5a.

This Court's precedent makes it explicit that, in applying the *Brecht* standard, the State bears the burden of negating the effect of an error on the outcome of a case. *United States v. Dominguez Benitez*, 542 U.S. at 81 n. 7; *O'Neal v. McAninch*, 513 U.S. at 437-443.

Because the federal judges who have considered this case viewed the question of prejudice as such a close one, App. 8a (the magistrate judge stated "petitioner comes close to demonstrating actionable error"); App. 2a (the panel majority stated that the erroneously excluded evidence "would have substantially bolstered [Mr.] Fry's claims of innocence") (internal quotation marks and brackets omitted); App. 5a (the dissenting member of the panel stated: "I am convinced that the exclusion of Ms. Maples' testimony was not harmless[.]"), this erroneous allocation of the burden of proof probably made the difference in the outcome of the lower federal courts' resolution of this case. Such error should not be a determinative factor in a case that has been plagued throughout by profound constitutional error.

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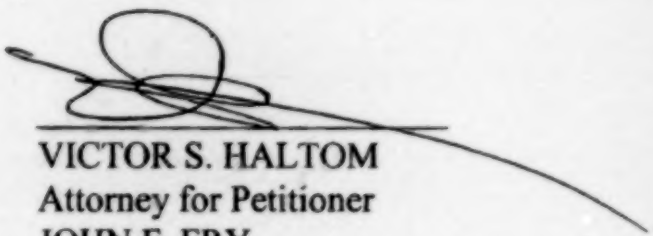
## CONCLUSION

Either the petition for a writ of certiorari should be granted, or a GVR order should be issued so as to enable the Ninth Circuit to consider the issues herein in light of this Court's recent decisions in *Holmes* and *House*.

Respectfully Submitted,



VICTOR S. HALTOM
Attorney for Petitioner
JOHN F. FRY

June 20, 2006

## APPENDICES


A. Opinion of the U.S. Court of Appeals for the Ninth Circuit (February 20, 2006) ..... 1a

B. Ninth Circuit Denial of Rehearing En Banc (April 25, 2006) ..... 6a

C. Judgment of the U.S. Court of Appeals for the Ninth Circuit (May 5, 2006) ..... 7a

D. Memorandum of Findings and Recommendations of the Magistrate Judge (June 2, 2004) ..... 8a

E. Order of the U.S. District Court for the Eastern District of California, Adopting the Findings and Recommendations of the Magistrate Judge (August 27, 2004) ..... 73a

F. Opinion of the California Court of Appeal, First Appellate District, Division Three (March 31, 2000) ..... 75a

G. Excerpt of Reporter's Transcript of Proceedings in *People v. Fry*, docket no. C34299, California Superior Court, Solano County (April 20, 1995) ..... 145a

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

**FEB 02 2006**

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

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| JOHN FRANCIS FRY,<br><br>Petitioner - Appellant,<br><br>v.<br><br>CHERYL K. PLILER, Warden,<br><br>Respondent - Appellee. | No. 04-16876<br><br>D.C. No. CV-01-01580-FCD -ST<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the Eastern District of California
Frank C. Damrell, District Judge, Presiding

Argued and Submitted October 18, 2005
San Francisco, California

Before: D.W. NELSON, RAWLINSON, and BEA, Circuit Judges.

After two mistrials on account of hung juries, John Fry was convicted of two counts of first degree murder in California Superior Court.[1] His conviction was affirmed by the California Court of Appeal and the California Supreme Court.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[1] Because the parties are familiar with the factual and procedural history we do not include them here except as necessary to explain our disposition.

Fry's petition for federal writ of habeas corpus under 28 U.S.C. § 2254 was denied by the district court. We have jurisdiction under 28 U.S.C. § 2253(a) and we affirm.[2]

The exclusion of Pamela Maples' testimony involved an unreasonable application of clearly established federal law, because her testimony was "material and would have substantially bolstered [Fry's] claims of innocence." *Chia v. Cambra*, 360 F.3d 997, 1003 (9th Cir. 2004). Maples did overhear large portions of a conversation involving her cousin, Anthony Hurtz, in which Hurtz indicated that he had committed a double homicide. Because Maples did hear large portions of this conversation—and because the portions of the conversation Maples did hear involved idiosyncratic facts exactly matching the facts surrounding the murder of Cynthia and James Bell, the victims in this case—we find her testimony to be sufficiently reliable. However, even assuming constitutional error, the exclusion of Maples' testimony was harmless because it did not have "a

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[2] Fry is in custody pursuant to a judgment of a state court. Therefore, the writ of habeas corpus will not be granted unless the state court's adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). We review *de novo* the district court's denial of a 28 U.S.C. § 2254 petition for writ of habeas corpus. *Bailey v. Rae*, 339 F.3d 1107, 1111 (9th Cir. 2003).

substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citation omitted).[3]

Second, the exclusion of Robert Morse's testimony was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, because, if admissible at all, the excluded evidence was not substantive evidence of a third party's culpability in the charged homicides. Therefore, Morse's testimony was not of significant importance to Fry's third party culpability defense and its exclusion was not constitutional error. *See Chia*, 360 F.3d at 1004. Assuming constitutional error in excluding Morse's testimony, that error was harmless because it did not have a substantial and injurious effect on the outcome of the trial. *Brecht*, 507 U.S. at 637.

AFFIRMED

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[3] Fry contends that this court should not apply the *Brecht* harmless error standard because the state appellate court failed to conduct a meaningful prejudice review. We have held, however, that the *Brecht* standard applies uniformly in all federal habeas corpus cases under § 2254 regardless of the error standard, if any, applied by the state court. *Bains v. Cambra*, 204 F.3d 964, 976 (9th Cir. 2000); *see also Inthavong v. LaMarque*, 420 F.3d 1055, 1059 (9th Cir. 2005).

FILED

FEB 02 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

***Fry v. Pliler*, No. 04-16876**
**Rawlinson, Circuit Judge, dissenting:**

I respectfully dissent from that portion of the disposition concluding that the exclusion of Pamela Maples' testimony was harmless error under *Brecht v. Abramson*, 507 U.S. 619 (1993).

Using the *Brecht* analysis, constitutional error is harmless unless it has a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638.

In performing the *Brecht* analysis, "we consider the record as a whole," including the strength of the State's case. *Id.*

In my view, the record as a whole militates in favor of a conclusion that exclusion of Ms. Maples' testimony substantially and injuriously affected the jury's verdict in this case.

As the district court noted, this was John Fry's third trial, with the two prior juries having failed to reach a verdict. In this third trial, even in the absence of Ms. Maples' exculpating testimony, the jury deliberated for five weeks before convicting Fry.

Ms. Maples was the only unbiased witness presented by either side. She also implicated her cousin in the murder for which Fry was on trial. Such

testimony is generally recognized as having a powerful impact on jurors. *See Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (noting that testimony of a disinterested witness "would quite naturally be given much greater weight by the jury."); *see also Bailey v. Rae*, 339 F.3d 1107, 1116 (9th Cir. 2003) ("Independent corroboration of the defense's theory of the case by a neutral and disinterested witness . . . can undermine confidence in a verdict.").

Because I am convinced that the exclusion of Ms. Maples' testimony was not harmless, I respectfully dissent.

FILED

APR 25 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN FRANCIS FRY,

Petitioner - Appellant,

v.

CHERYL K. PLILER, Warden,

Respondent - Appellee.

No. 04-16876

D.C. Nos. CV-01-01580-FCD
Eastern District of California,
Sacramento

ORDER

Before: D.W. NELSON, RAWLINSON, and BEA, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges D. Nelson and Bea have voted to deny the petition for panel rehearing. Judge Bea has voted to deny the petition for rehearing en banc, and Judge D. Nelson so recommends. Judge Rawlinson has voted to grant both the petition for panel rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for an en banc hearing and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b). The petition for panel rehearing and the petition for rehearing en banc are DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN FRANCIS FRY,

Petitioner - Appellant,

V.

CHERYL K. PLILER, Warden,

Respondent - Appellee.

No. 04-16876
D.C. No. CV-01-01580-FCD GGH HC

**JUDGMENT**

MAY - 5 2006
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

Appeal from the United States District Court for the Eastern District of California (Sacramento).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 02/02/06

FILED
MAY - 5 2006
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
MAY 03 2006
BY: _____ Deputy Clerk

FILED
JUN 2 2004
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN FRANCIS FRY,

Petitioner, No. CIV S-01-1580 FCD GGH P

vs.

CHERYL PLILER, Warden, FINDINGS & RECOMMENDATIONS

Respondent.

_____/

I. INTRODUCTION

It should not be surprising that in a case where it took no less than *three* trials to convict petitioner, with deliberations in the third trial taking *five weeks*, that the present habeas action would present complicated issues which necessitate a lengthy discussion. However, while petitioner's counsel is to be commended for his efforts with respect to his primary claims, and although petitioner comes close to demonstrating actionable error in some of his various claims, the petition ultimately falls short.

Petitioner, a state prisoner represented by counsel, is proceeding on an amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, filed on June 24, 2002.[1]

[1]The original petition was filed on August 15, 2001.

Petitioner challenges his 1995 jury trial conviction for two counts of first degree murder; the jury found true the multiple murder special circumstance and the use of a firearm. Amended Petition (AP), p. 11, Clerk's Transcript (CT) 995-97; Answer (Ans.), p. 1. Petitioner was sentenced to life without the possibility of parole plus a term of 35 years (CT 1036-37[2]). For the reasons set forth herein, the petition should be denied.

II. ISSUES

Not even the issues are easily discerned in this action. In his amended petition, several overarching issues are raised with discrete subissues underlying those issues. However, it is less confusing in this lengthy Findings to discretely break out all the issues. The court has identified all discrete issues (as were separately set forth in the traverse) as follows:

A. Admission of character evidence (a prior criminal incident engaged in by petitioner) violated due process;

B. Admission of coerced testimony of witnesses violated due process rights of petitioner (includes "claim" that failure of court to grant evidentiary hearing on issue of coercion violated due process);

C. Petitioner's right of cross examination was unduly restricted with respect to petitioner's brother's testimony (including the area of threats made to the brother by the police);

D. Petitioner was denied his right to present a defense by exclusion of testimony of a witness who overheard a third party confession (Hurtz) to the murders;

E. Petitioner was denied his right to present a defense when the trial court excluded the prior convictions of the "actual killer" (Hurtz);

F. Petitioner was denied his right to present a defense when the trial court excluded evidence of a third party's possession of the murder weapon (actually—evidence that would have impeached a witness that testified the third party did *not* have possession of the weapon);

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[2] Pages 1018 to 1035 of the Clerk's Transcript (CT) are missing from respondent's submission to the court.

G. Petitioner was denied his right to present a defense when the trial court excluded the prior acts of violence of the "actual killer's" accomplice;

H. Petitioner's Sixth Amendment and due process rights were violated when the trial judge directed the jurors to continue deliberating after they had announced a deadlock on the ninth day of deliberation;

I. Petitioner's Sixth Amendment and due process rights were violated when the testimony was read back in a misleading fashion.

III. EXHAUSTION

Review of the merits is delayed by one exhaustion issue. Although there is no question that the coerced testimony of witnesses claim (Issue B, above) was exhausted on its merits, respondent asserts that the subclaim—petitioner's due process rights were violated by the trial court's failing to hold an evidentiary hearing on his coerced testimony allegations—was not exhausted. The court need not determine the exhaustion question because it is clear that the subclaim does not set forth a claim cognizable in federal habeas corpus.

Whether the state trial court held an evidentiary hearing on an evidence preclusion issue (thereby fairly and accurately finding the facts relevant to a ruling on the merits) is only pertinent to the *federal procedural* habeas issues concerning the use of any factual presumption of correctness, 28 U.S.C. § 2254(e)(1) and/or the need for an evidentiary hearing *in federal habeas*. § 2254(e)(2). There is no recognized federal constitutional claim that one has a federal due process right to state court evidentiary hearings on evidence issues. Accordingly, this subclaim should be summarily dismissed which obviates the need for an exhaustion discussion, and permits the court to reach the merits of other issues. 28 U.S.C. § 2254 (b)(2).

IV. AEDPA

The AEDPA applies to this petition for habeas corpus which was filed after the AEDPA became effective. Neelley v. Nagle, 138 F.3d 917 (11th Cir.), citing Lindh v. Murphy,

117 S. Ct. 2059 (1997). The AEDPA "worked substantial changes to the law of habeas corpus," establishing more deferential standards of review to be used by a federal habeas court in assessing a state court's adjudication of a criminal defendant's claims of constitutional error. Moore v. Calderon, 108 F.3d 261, 263 (9th Cir. 1997).

In Williams (Terry) v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000), the Supreme Court defined the operative review standard set forth in § 2254(d). Justice O'Connor's opinion for Section II of the opinion constitutes the majority opinion of the court. There is a dichotomy between "contrary to" clearly established law as enunciated by the Supreme Court, and an "unreasonable application of" that law. Id. at 1519. "Contrary to" clearly established law applies to two situations: (1) where the state court legal conclusion is opposite that of the Supreme Court on a point of law, or (2) if the state court case is materially indistinguishable from a Supreme Court case, i.e., on point factually, yet the legal result is opposite.

"Unreasonable application" of established law, on the other hand, applies to mixed questions of law and fact, that is, the application of law to fact where there are no factually on point Supreme Court cases which mandate the result for the precise factual scenario at issue. Williams (Terry), 529 U.S. at 407-08, 120 S. Ct. at 1520-1521 (2000). It is this prong of the AEDPA standard of review which directs deference to be paid to state court decisions. While the deference is not blindly automatic, "the most important point is that an *unreasonable* application of federal law is different from an incorrect application of law....[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams (Terry), 529 U.S. at 410-11, 120 S. Ct. at 1522 (emphasis in original). The habeas corpus petitioner bears the burden of demonstrating the objectively unreasonable nature of the state court decision in light of controlling Supreme Court authority. Woodford v. Viscotti, 537 U.S. 19, 123 S. Ct. 357 (2002).

The state courts need not have cited to federal authority, or even have indicated awareness of federal authority in arriving at their decision. Early v. Packer, 537 U.S. 3, 123 S. Ct. 362 (2002). Nevertheless, the state decision cannot be rejected unless the decision itself is contrary to, or an unreasonable application of, established Supreme Court authority. Id. An unreasonable error is one in excess of even a reviewing court's perception that "clear error" has occurred. Lockyer v. Andrade, 538 U.S. 63, 75-76 , 123 S. Ct. 1166, 1175 (2003). Moreover, the established Supreme Court authority reviewed must be a pronouncement on constitutional principles, or other controlling federal law, as opposed to a pronouncement of statutes or rules binding only on federal courts. Early v. Packer, 537 U.S. at 10, 123 S. Ct. at 366.

However, where the state courts have not addressed the constitutional issue in dispute in any reasoned opinion, the federal court will independently review the record in adjudication of that issue. "Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable." Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003).

## V. BACKGROUND

### A. Procedural Background

The First District Court of Appeals (division three) succinctly summarizes the convoluted procedural background of this case:

> Appellant was charged in February 1993 with three counts of first degree murder of three victims (James Bell, Cynthia Bell, and Jason Gibeau), with allegations of the special circumstance of multiple murder and of firearm use. (Pen. Code, §§ 187; 190.2, subd. (a)(3); 12022.5.)
>
> Unless otherwise indicated, all further statutory references are to the Penal Code.
>
> In May 1993, appellant's section 995 motion to set aside the information was granted with respect to the charged murder of Gibeau.
>
> Appellant's first two trials resulted in mistrials due to juror

> deadlock.[3] Appellant's third jury trial commenced on February 24, 1995. On June 8, 1995, the jury convicted appellant of first degree murder on both counts, and found true the allegations of firearm use and multiple murder special circumstances. He was sentenced to life in prison without the possibility of parole, plus a term of 35 years.

Exhibit (Exh.) D to Answer, First District Court of Appeals unpublished opinion, March 31, 2000, p. 34.

Upon petitioner's petition for review to the California Supreme Court of the appellate court's denial of his writ application, the petition was denied on July 12, 2000. Exh. F to Answer. The original petition in this matter was filed in this court on August 15, 2001. Counsel was appointed by order filed on August 28, 2001. By order filed on October 5, 2001, petitioner was directed, if he chose to amend, to file a first amended petition within 120 days. Following several grants of requests for extension of time (see Orders filed on January 31, 2002, March 26, 2002, June 10, 2002, and June 17, 2002, the first amended petition was filed on June 24, 2002).

Petitioner had three separate jury trials before he was convicted. Amended petition (AP), p. 2, RT 5337-5338. In the first trial, the jury was deadlocked with a 6 to 6 split:

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[3]Petitioner sets forth the dates of the two prior deadlocked trials: the first jury trial on two murder counts and the multiple murder special circumstances allegation began on February 22, 1994 and was declared a mistrial on April 4, 1994. AP, p. 10, CT 222-257, 374. The second jury trial began on August 24, 1994 and concluded on October 21, 1994, when a mistrial was declared due to another deadlocked jury. AP, p. 10, CT 510-524, 530-552, 557-559, 569-570, 575-578, *664-671, 683. (*Note: pages 660-667 of the clerk's transcript do not appear to be included in the record before this court).

six voting to acquit, six voting for conviction.[4] The second trial ended with a 7 to 5 deadlock in favor of conviction. AP, p.2, CT 664-667.[5]

The presentation of evidence in the third trial lasted eleven (11) weeks; jury deliberations went on for five (5) weeks. AP, p. 2. Numerous votes were taken with the jurors unable to reach a unanimous verdict. Id. There were numerous testimony readbacks requested by jurors. Id. Jurors advised the court at one point that they were split 7-5. AP, p. 2, RT 5154.6. Only two jurors at that time believed that a verdict could be reached. AP, pp. 2-3, 10, RT 5154.-5154.8. When the jury sought more information about the reasonable doubt standard, they were referred to the instruction they had been provided. AP, p. 3, RT 5154.9. When the trial judge told jurors to return for further deliberations, he also informed them that he would check with them again the following day but failed to do so. AP, p. 3, RT 5154.9, 5233. More than a week later, at least one juror showed concern that she would lose her job if deliberations did not come to an end; a verdict was eventually reached, finding petitioner guilty on all charges. AP, p. 3, RT 5233, 5337-5338. In Exhibit B to the amended petition, petitioner includes a letter from petitioner's trial counsel, the former (now deceased) director of the Solano County Conflict Defender's Office, Lorraine E. Voss, which petitioner asserts demonstrates his trial counsel's abiding conviction that he is innocent of the double homicide. AP, p. 3 and Exh. B.[6]

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[4]According to petitioner's counsel, the reporter's transcript (RT) of the first trial contains some 1,758 pages of witness testimony; the second trial's RT contains 2,722 pages of witness testimony; the third trial, at issue here, has a RT including 5,377 pages of trial proceedings, as well as a clerk's transcript (CT) of 1048 pages. AP, pp. 3, 9 fn.18.

[5]As previously noted (see footnote 3), these pages are among those missing in the court transcript submitted to this court.

[6]In a March 5, 1996 letter to petitioner's appellate counsel wherein Ms. Voss turns over the case file, she concludes: "Going through this trial in front of Judge Harrison (twice) was the most awful experience of my life. I doubt if the trial transcripts in this case could truly reflect what an awful experience it was. It was only my faith in Jay Fry and his innocence that kept me going." Exh. B to AP. As Exh. E, petitioner includes trial counsel's preliminary information re: appeal, another intensely critical (also without setting forth specific factual underpinnings)

B. Factual Background

Petitioner notes that the relevant facts of the case have been extensively set forth in the state court of appeals slip (unpublished) opinion. AP, p. 12, fn 28. This court's independent review has confirmed the accuracy of the facts/record as set forth in the state appellate court decision:[7]

> Between 6:15 and 6:30 a.m., on October 27, 1992, the bodies of James and Cynthia Bell
>
> > [Footnote 1:] At various points during the trial, Cynthia Bell was also referred to as "Cynthia Edon." For consistency, throughout this opinion we will refer to the female victim in this case as Cynthia Bell.
>
> were discovered in a white 1978 Camaro automobile parked on the dirt shoulder of Interstate 505 near the freeway intersection with VacaValley Parkway. Both victims had been shot. Cynthia's body was on the driver's side, with the window down. The victim's left arm was resting on the door sill, and her body was turned to the left as though she had been talking to someone outside the vehicle. According to witnesses who first saw the body, the upper portion of Cynthia's head was "missing." James's body was in the front passenger seat, slumped toward Cynthia's body. The car keys were in the ignition and turned to the "on" position. However, the engine was not running; the gas tank was empty, and the battery was dead. Black, sooty carbon deposits were visible directly below the tailpipe, indicating the car had been idling for some period of time at that location. There was an empty paper soft-drink cup from a Chevron minimart between James's thighs.
>
> When police officers and paramedics arrived at the scene between 7:00 and 7:30 a.m., they found the bodies "ashen," "very cold," "very firm," and mottled or marbled in appearance. Pictures were taken of the victims' bodies and the crime scene between 8:30 and 10:00 a.m., before the bodies were moved or disturbed. By the

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assessment by Ms. Voss: "This trial was a complete nightmare both the 2nd and 3rd time. The judge for the last 2 trials was something I can't put down on paper. The two district attorneys involved were not of sterling character. In fact[, in] the last trial the district attorney's office attempted to manipulate phoney [sic] charges against defense counsel in order to win! The last trial in particular was a twilight zone experience." The record shows that Ms. Voss was commended by the trial court for her efforts in defense of petitioner (through the several trials). AP, p. 3, n. 5, RT 5346. The court notes that the prosecutor who had inherited the case was also commended. RT 5346.

[7]Petitioner's counsel also quotes from this summary. See AP, p. 12.

time the coroners removed the victims from the car between 11:00 and 11:30 a.m., the bodies were totally rigid and stiff, and retained their postures when moved.

Three bullets were recovered: one from James' cheek; a second from the passenger door; and a third from the rear floor of the Camaro behind the passenger seat. Dr. Aaron Lipton, the pathologist who performed the autopsies on the victims, testified that Cynthia had sustained "massive damage" to the upper part of her face and skull, "with a large area of these areas of the face and skull absent . . . [a]nd a large portion of the brain material beneath the skull also absent." Dr. Lipton opined that the gunshot wound to Cynthia's head, which was the cause of her death, was the result of someone shooting her in the face from only inches away. Under the circumstances, the shooter "[p]ossibly" would be "covered with blood and tissue" from the victim. James had a total of eight bullet wounds on his head, chest, back and wrist; death resulted from the wounds to the head and lungs. Dr. Lipton opined that James' wounds were caused by shots fired at him from the driver's side of the car.

Based on the photographs of the victims taken after their bodies had been taken out of the Camaro, Dr. Lipton opined that they appeared to be "in full rigor mortis," a condition which, in a temperate climate like that present at the time and location of the crime, usually develops "between six and twelve hours" after death and then subsides within 36 hours. Rigor mortis would manifest by a "very firm" condition of the muscles directly under the skin. At the time he performed the autopsies, beginning at approximately 8:30 a.m., on October 28, 1992, Dr. Lipton noted only "mild" or "moderate" rigor mortis remaining in the victims' bodies. On cross-examination, Dr. Lipton testified that he originally estimated the victims had died three or four hours before the bodies were found, based on the pictures and the descriptions given by the police investigators. However, he also testified there are many different variables affecting the accuracy of any estimate of the time of death based on rigor mortis.

Several witnesses testified to having seen an older-model white Camaro, matching the description of the victim's car, parked at the crime scene between approximately 8:30 and 10:00 p.m. on October 26, 1992, in the same location and position where it was subsequently found with the victims' bodies the next morning. At least four different witnesses also described seeing an older-model pickup truck with a light-colored camper shell parked near the Camaro at some point during this time period.

Two other individuals testified that they encountered the victims and their white Camaro at a nearby convenience store sometime between 8:40 and 9:00 p.m. on the evening of October 26, 1992. Both witnesses testified they saw James talking on a pay

> telephone, and heard Cynthia say something referring to "Leroy." Neither witness could tell whether Cynthia was talking to James about someone else named "Leroy," or addressing James by his own middle name of "Leroy." A third witness saw both victims sometime between 9:30 and 10:00 p.m. on October 26, 1992, at the Chevron minimart where she worked as a cashier. James purchased a soft drink at the time.

Exh. D to Answer, First District Court of Appeal decision, pp. 2-4.

VI. DISCUSSION OF CLAIMS

A. Trial Court Violated Petitioner's Fourteenth Amendment Rights to Due Process and to a Fundamentally Fair Trial by Erroneous Admission of Prosecution's Highly Prejudicial Character Evidence (Arleen Murphy Incident)

Petitioner contends that he has been deprived of due process and subjected to a fundamentally unfair trial by the trial court's having allowed, over defense objection, testimony about a previous incident involving petitioner to prove "motive, opportunity, intent, preparation, plan, knowledge, identity." The incident involved a witness named Arleen Murphy who charged that she had been threatened by petitioner within two days of the double homicide at issue. AP, pp. 33-34; Answer, pp. 7-8; Traverse, p. 31.

Petitioner understands that a violation of state evidence law does not in itself equate with a constitutional violation. The Supreme Court has reiterated the standards of review for a federal habeas court. Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475 (1991). In Estelle v. McGuire, the Supreme Court reversed the decision of the Court of Appeals for the Ninth Circuit, which had granted federal habeas relief. The Court held that the Ninth Circuit erred in concluding that the evidence was incorrectly admitted under state law since, "it is not the province of a federal habeas court to reexamine state court determinations on state law questions." Id. at 67-68, 112 S. Ct. at 480. The Court re-emphasized that "federal habeas corpus relief does not lie for error in state law." Id. at 67, 112 S. Ct. at 480, citing Lewis v. Jeffers, 497 U.S. 764, 110 S. Ct. 3092, 3102 (1990), and Pulley v. Harris, 465 U.S. 37, 41, 104 S. Ct. 871, 874-75 (1984) (federal courts may not grant habeas relief where the sole ground

presented involves a perceived error of state law, unless said error is so egregious as to amount to a violation of the Due Process or Equal Protection clauses of the Fourteenth Amendment). The Supreme Court further noted that the standard of review for a federal habeas court "is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States (citations omitted)." Estelle v. McGuire, 502 U.S. at 68, 112 S. Ct. at 480. The Court also stated that in order for error in the state trial proceedings to reach the level of a due process violation, the error had to be one involving "fundamental fairness," Id. at 73, 112 S. Ct. at 482, and that "we 'have defined the category of infractions that violate "fundamental fairness" very narrowly.'" Id. at 73, 112 S. Ct. at 482. Habeas review does not lie in a claim that the state court erroneously allowed or excluded particular evidence according to state evidentiary rules. Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991).

Background

Arleen Murphy's testimony is contained in the reporter's transcript (RT) from page 1185-1219; 1234-1349.[8] The court again borrows from the state court appellate decision

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[8]Although Murphy also testified that petitioner threatened to kill the Bells (RT 1256), the murder victims in this case, that testimony, as respondent notes, and petitioner concedes, is not at issue within this claim(Ans., p. 8; Traverse, p. 31, fn. 11), nor, specifically, is the testimony by another witness, Lynn Ruiz, witness Arleen Murphy's aunt, which, in its relevant portion, is summarized by the state appellate court as follows:

> Lynn Ruiz, Murphy's aunt, had been friends with victim Cynthia Bell for 15 years, and had known James Bell for about 5 years. On October 24, 1992, she saw Murphy and appellant at the gas station where she was working. Murphy appeared "nervous" and "antsy," like she was "in a hurry or bothered or something." At approximately 1:30 p.m. on October 26, 1992, Ruiz received a page from a telephone number she did not recognize. When Ruiz returned the call, appellant identified himself, stated he had asked Murphy to place the page for him, and said he wanted to talk with Ruiz about Cynthia. Appellant gave Ruiz his address and asked her to stop by his home after she got off work. Ruiz agreed.
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> .....
>
> Appellant told Ruiz he had been upset with Murphy because he thought she was involved in a conspiracy with Bernal and others "to rip him off also," and described the incident in which he had taken "her for a ride out to the country," "scared her and threatened

for an accurate summary of the facts that underlie this claim (any modification is by way of footnote):

> Several prosecution witnesses testified to appellant's erratic behavior during the weeks prior to the murders. Arleen Murphy had known appellant for 32 years, although she had lost touch with him for about 10 years until meeting him again in October 1992.[9] On October 24, 1992, appellant drove Murphy to Davis in his blue truck with a white camper shell on it.[10] As he "always" did, appellant had a gun in a case on the dashboard of his truck. He was also carrying a second gun in his belt. After driving Murphy out a back road and stopping in an isolated location on a levee, appellant told Murphy he was upset because he thought she was in league with their mutual acquaintance Ryan Bernal to steal $1,300 from him, and it was time for her "to go to sleep." Murphy tearfully tried to tell appellant she had no reason to steal from him. Saying he "had to show somebody up north that he had killed" her, appellant held his gun out of the window and fired two shots into the air. Appellant then told Murphy "he was going to get to the bottom of why . . . he was being told [Murphy] was going to steal" his money. Then appellant drove Murphy back to a gas station where Murphy's aunt, Lynn Ruiz, worked. Appellant again told Murphy "[s]ome people up north" were supposed to think she was dead, and to stay in hiding for a couple of days "so he could get to the bottom of this."

Exh. D to Answer, pp. 4.

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> her," and "took his gun and told her he was going to blow her away . . . if she didn't explain . . . ." He had pointed his gun at Murphy's head, and had then fired "a couple shots out the window to scare her or something." Appellant told Ruiz that Murphy and Bernal "had to prove their loyalty." He "wanted to blow everybody away," and had only refrained from killing Murphy because he had "known her for 20 years" since they "went to school together."

Exh. D to Answer, pp. 5-6.

[9]On cross-examination, the undersigned notes, Ms. Murphy clarified that she and petitioner had both grown up in Dixon and had known each other since kindergarten and elementary school, riding the same bus over a ten-year period. RT 1266-1267.

[10]Petitioner notes that Murphy testified that she ran into petitioner by happenstance on October 24, 1992 in the Lucky's supermarket lot in Davis; petitioner testified that Murphy called him to pick her up and give her a ride home to Dixon from Davis. AP, p. 33, RT 1190, 1269; RT 2845. Also in the record, on cross-examination of Murphy, her prior testimony in a preliminary hearing in January of 1993 was read into the record wherein Murphy had testified that she had called petitioner for a ride. RT 1270-71.

> Petitioner offered his own version of the Arleen Murphy incident at trial: Appellant acknowledged driving Murphy out into the country on October 24, 1992. He claimed he was merely taking the "rural route" to Davis. According to appellant, Murphy was "hysterical," so he simply let her talk for a while. Then he began to question her about a tape recording he had heard of a suspicious conversation between Murphy and Bernal. Appellant denied threatening to kill Murphy at any time or pointing a gun at her. According to appellant, he simply "decided to play a little game," and shot his gun out of the truck window twice. Appellant next saw Murphy on the morning of October 26, when, according to him, she called to ask him to pick her up at a friend's apartment in Davis. When he arrived, he became irritated because no one was there. He kicked the door, and it "flew open." He then went in and sat on a couch, thinking "somebody would show up sooner or later." When Murphy arrived, appellant left a note apologizing for the damage to the door.

Exh. D to Answer, pp. 21-22.

Petitioner asserts that trial counsel's motion in limine to exclude evidence of the Murphy shooting incident correctly characterizes any such evidence as "a propensity argument in disguise." AP, p. 34, citing CT 813. Petitioner sets forth the following portion of defense counsel's argument before the trial court:

> The only issue in the case is the identity of the perpetrator. Motive is not an issue. The defendant has never denied that he had reasons to be upset with the female victim because she attempted to burglarize his home. The issue of murder is uncontested ... A theory that the incident in the remote area shows how the defendant deals with people he believes have stolen from him is a propensity argument in disguise. The argument more properly put is that the defendant when faced with people who attempt to steal from him has the propensity to act with violence or threats of violence. The courts have consistently found that evidence of other crimes or misconduct is inadmissible to prove propensity or disposition.

AP, p. 34, CT 813-14.

> Petitioner quotes the prosecution's argument from the reporter's transcript: [The incident is] very relevant in terms of 1101(b), in terms of the types of threats which are being made and the reason why they were being made. The time span, of course, is within a matter of a couple of days of the murders. It's alleged that the murders of the Bells...was a result [of[... a theft, or at least in part an alleged theft of narcotics by them from the defendant, which is the same complaint which the defendant had to Ms. Murphy[.] ... [T]he defendant's response to Ms. Murphy was the same as it's alleged

> with the Bells, that he took the gun, the same gun,... took the– confronted the individuals in an isolated spot, and threatened to kill them, and in fact did so with the Bells.

AP, p. 35, RT 468.

Petitioner contends that the prosecution's reliance on Cal. Evid. Code 1101(b) was "token." AP, p. 35. The record indicates that the prosecution offered, in part, the following rationale for the testimony at issue:

> [I]t goes to showing the defendant's motive, intent preparation,...and identity as to what happened a couple of days later to the Bells.
>
> [W]hat we have...is this incident happens within a couple of days of the killing of the Bells. It is related to what the defendant perceived to be an attempt by Arleen Murphy and perhaps Ryan Bernal to steal methamphetamine from him.

RT 477.

Petitioner points to the closing argument wherein the prosecutor allegedly stressed the Murphy incident to persuade jurors to view petitioner as "a menacing and evil man" based on that event—the kind of man capable of committing the heinous murders of this case. AP, pp. 35-36, RT 5008-5009.[11]

In its unpublished decision, the First District Court of Appeal analyzed the issue as follows:[12]

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[11] "You have that terrible ride in the country. Arleen Murphy, think back to her. Talking about demeanor, one of those palpable, real things in this courtroom was her presence on the witness stand. As she talked about her dealings with the defendant and that ride in the country and being at his house on that Monday and that fear which was still in here two-and-a half years afterwards was as real as anything else. You heard her talk about the statements the defendant was making right up to that Monday when she's over there... She was afraid the night of the ride in the country when her aunt, Lynn Ruiz, saw her. She was more afraid that night, that Monday night, because she knew what was going to happen. She knew just as sure as the defendant had told her on that Saturday he was going to kill her, that when he said he was going to go and kill the Bells, he meant it, and she was afraid. She was relieved that it was not her." RT 5009.

[12] In conducting an AEDPA analysis, it is the state court's "last reasoned decision," which in this case is the unpublished opinion of First District Court of Appeals, that is to be examined. Benn v. Lambert, 283 F.3d 1040, 1052 n. 7 (9th Cir. 2002).

> In a corollary to the preceding argument, appellant urges that because his proffered "bad acts" evidence against Borelli was excluded, the trial court should also have excluded the evidence of appellant's threatening behavior toward Murphy. There is no merit to the contention.
>
> The crucial difference between the two situations is both obvious and determinative. As seen, there was no competent evidence proffered concerning Borelli's alleged prior threats or misdeeds against third persons. On the other hand, Murphy herself testified at length about how appellant took her for a long drive along deserted country back roads, stopped his pickup truck in an isolated location, threatened her life over a drug and money dispute, fired his .357-magnum out of the window, and told her he "was going to get to the bottom of this." Murphy's direct testimony about appellant's words and actions toward her indisputably distinguishes this incident from those alleged by appellant of Borelli.
>
> By the same token, there is no question the evidence of appellant's behavior toward Murphy was admissible to prove motive, opportunity, intent, preparation, plan, knowledge and potential identity. The incident evidenced appellant's practice of using his gun to threaten people over drug and money disputes, his method of going to an isolated spot to do so, and his stated desire and intent to kill those who he perceived as cheating him. This incident, occurring only two days before the subject murders, clearly demonstrates motive, plan, intent and identity. There was no error or abuse of discretion in admitting this evidence.

Exh. D to Answer, pp. 54-55.

Petitioner relies on the pre-AEDPA case of McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993) which did hold that unwarranted and unduly prejudicial admission of propensity evidence constituted a due process violation. Id. at 1385. McKinney understood that the Supreme Court had left "unanswered" the question: "When does the use of character evidence to show propensity constitute a violation of the Due Process Clause?" Id. at 1384. McKinney did cite to federal criminal cases which recognized the disfavored nature of character evidence,[13] but none had gone so far as to equate admission of character evidence with a federal constitutional

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[13]Interestingly enough, the disfavored character propensity evidence has nonetheless found favor in sexual assault cases. See United States v. Sioux, 362 F.3d 1241, 1243-44 (9th Cir. 2004).

violation. The U.S. Supreme Court has, in fact, specifically left that question open. "Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime." Estelle v. McGuire, 502 U.S. 62, 75 n.5, 112 S. Ct. 475, 484 n.5 (1991). Because violation of clearly established law as pronounced by the *United States Supreme Court* is the sine qua non for an AEDPA violation, see Holgerson v. Knowles, 309 F.3d 1200, 1202 (9th Cir. 2002) (habeas relief not warranted if due process violation not clearly established by the Supreme Court), and such pronouncement is not available for the character/propensity evidence issue, petitioner is left to claiming that the interpretation of California law by California courts was wrong.

However, the record of this case discloses that the state courts did indeed interpret their law as allowing the use of the asserted character evidence of which petitioner complains. Because this court may not second guess the state courts on application of their law (except in circumstances demonstrating an avoidance of a federal constitutional rule), see Estelle, supra, at 502 U.S. at 67-68, 112 S. Ct. at 480; see also Belmontes v. Woodford, 350 F.3d 861, 888 (9th Cir. 2003), there remains nothing for this federal court to adjudicate. That is, in the absence of a recognized federal constitutional principle at odds with the state law, see, e.g., Crawford v. Washington, __U.S.__, 124 S. Ct. 1354, (U.S.Wash. Mar 08, 2004) (Confrontation Clause does not permit "prior testimony" hearsay evidence not subject to cross-examination even if permitted by state law), this court's AEDPA analysis is over. This is not a situation where the state courts conceded error but found the error to be harmless. In such a situation, it would be possible for the federal courts to review the evidentiary error for fundamental unfairness, but this case does not present the issue.

Accordingly, the state courts' decision on the admissibility of the character evidence under state law is the first and last word on this claim. The claim herein should be denied.

B. Trial Court's Admission of the Coerced Testimony of Prosecution Witnesses Shannon Paul Nissen, Edgar Fry and Deborah Kathleen Mathies Violated Fry's Right to Due Process

Petitioner claims that by allowing the testimony of "[t]he three most critical" prosecution witnesses without first conducting an evidentiary hearing to evaluate the claim of coercion, the trial court violated petitioner's Fourteenth Amendment due process rights. AP, p. 46. Trial witnesses Nissen, Fry (petitioner's younger brother) and Mathies testified (Mathies' testimony was by way of "readback," rather than live testimony (RT: 1934))[14], inter alia, that petitioner came home on the evening of October 26, 1992 with "blood on his person, clothing and effects"; all three, along with a jailhouse informant, also testified that petitioner confessed to the killings. AP, pp. 18-19, fns. 47, 48; citing RT 1682-1688; 1752-1759; 1962-1969; 1971-1972; 2010-2015.

The state court of appeals decision fairly sets forth the underlying facts of this claim:

> Kathleen (Debbie) Mathies's testimony at an earlier trial was introduced through reading a transcript.
>
> > [Footnote 2] In connection with Mathies' testimony, the trial court told the jury: "Counsel and the Court have been going over a transcript of the prior testimony in September of 1994 of the witness Debbie Mathies. We had anticipated that Debbie Mathies would be here earlier this week, and then even as late as today, and counsel have agreed that we can read her testimony and make a finding that she's unavailable for trial because of her voluntary use of drugs and unable to testify. And the fact that she is unavailable is in no way connected to any acts or influence of the defendant, Mr. Fry. This lady is unavailable for the reasons of her own voluntary use of drugs."
>
> Mathies testified that she was alone with appellant in his house a "couple" of days before the murders when someone knocked on the door. Mathies could see through a window that it was Cynthia

[14] It was stipulated that Debbie Mathies was unavailable for trial due to her own voluntary use of drugs and her failure to appear was not in any way related to petitioner. RT 1943-1944.

> Bell, and she informed appellant of that fact. Appellant told Mathies not to answer the door. Mathies went upstairs to see appellant in his bedroom, and closed the bedroom door. Cynthia went around to the back of appellant's house and entered through a sliding glass patio door. She then came upstairs and opened appellant's bedroom door. Cynthia appeared "shocked" and "surprised" to find that someone was there, and said she just wanted "to see what was going on" at the house. After a few minutes, Cynthia left. Later, Mathies overheard appellant tell Ringler that he was going to kill Cynthia because "she did him, wrong" over "[d]rugs and money." Mathies was also present at appellant's house on October 26, 1992, the day of the murders. At some point that day, she again heard appellant say he was going to kill Cynthia, and complain that Cynthia "owed him money for drugs, and they are lying and doing him wrong." Mathies had been using methamphetamine, marijuana and alcohol during the entire time period at issue.

Exh. D to Answer, pp. 7-8.

> In addition to Murphy, Ruiz, and Mathies, three other witnesses-Shannon Nissen, David Sparks and Edgar Fry-testified about appellant's actions in the days leading up to and including October 26, 1992, the date of the murder. A few days before the killings, appellant informed Nissen that Cynthia owed him $800 for drugs, and that Cynthia had told his girlfriend Ringler that appellant was sleeping with Cynthia. Appellant "wasn't happy" about this. Appellant's brother, Edgar Fry, testified that during the day on October 26, appellant told him that "a day or so before this time" Cynthia had come into his residence without permission, and he had caught her coming up stairs. Appellant appeared "[i]Irritated"; he told Edgar he believed Cynthia had intended "[t]o steal his drugs." Appellant had a .357 revolver which he "usually" took with him whenever he left the house, carried in a soft tan-colored canvas case.
>
> On October 26, 1992, Nissen was at appellant's residence with appellant, Bernal, Murphy, appellant's brother Edgar, and Ringler and her two girls. Victims Cynthia and James Bell were also present for some period of time during the day. In addition, Sparks and his friend Jason Gibeau arrived at some point in the evening in a dark minitruck. Sparks was carrying a .38-caliber pistol and approximately $1,000 in cash, because he was interested in purchasing an ounce of methamphetamine. There was some discussion between Sparks and appellant about the latter purchasing Spark's gun, but no sale of the gun took place. There was also some discussion of purchasing drugs at appellant's house, but Sparks declined because he already had a deal set up elsewhere. After about 30 minutes, Gibeau and Sparks left in Gibeau's truck. Bernal asked appellant if they were meeting at "505." Appellant replied, "That will work." Shortly thereafter, between 7:00 and

7:30 p.m., appellant retrieved his gun, and he and Bernal left in appellant's truck after telling Edgar he "was going to go make a drug deal, do some business." At some point thereafter, Cynthia and James Bell also left appellant's house.

> [Footnote 3] Like much of the testimony in this case, there was some conflict in the witnesses' recollection of when the victims arrived at appellant's house on October 26, 1992, and when they left. As seen, Murphy testified the Bells arrived at approximately 5:30 p.m. shortly after Ruiz's departure, and she did not see them leave. Nissen testified that Cynthia and James Bell were present at appellant's house during the afternoon, and that they left about half an hour after appellant left with Bernal. On the other hand, Edgar Fry testified that the Bells were not at appellant's residence when he arrived there at approximately 5:00 p.m., and did not show up until 30 to 45 minutes after appellant left with Bernal. According to Edgar, the victims stayed for another 30 to 45 minutes and then left.

Edgar testified that Cynthia told him she was going to meet appellant near the "Wild Oates" store. The victims left in their automobile, a light-colored 1970's Camaro.

.....

Both Nissen and Edgar Fry testified that Bernal returned to appellant's house sometime later in the evening, stayed for a few minutes, and then left again. Hours later that night appellant returned, driving his light blue pickup truck with the camper shell on it. Nissen, Edgar, Mathies, and Ringler were all at appellant's house when he returned. Edgar, who was not wearing a watch, estimated that it was approximately 10:30 p.m. when appellant returned.

Nissen, Edgar and Mathies each gave somewhat differing accounts of appellant's actions and appearance upon his return home. Nissen testified that appellant was wearing a T-shirt, blue jeans and tennis shoes, and was carrying his gun case. According to Nissen, there were spots of blood on appellant's shirt, his shoes, his forehead, the gun case, and "maybe his pants." Appellant appeared "tired" and "kind of nervous"; he went to the kitchen, wiped his face and forehead with a towel, and then walked up to his bedroom. Edgar testified that appellant was wearing "[p]ants with no shirt," and carrying a "satchel or briefcase." He immediately went "straight upstairs" and into the bathroom off the master bedroom, from which Edgar heard running water. In response to Edgar's question, appellant said he had taken his shirt off because

there was blood on it. Edgar saw a large spot of blood on appellant's pants. Mathies saw appellant drive up and then sit in his truck for a while before coming in the house and going upstairs to the bathroom, where he washed blood off his hands. Mathies could not remember whether appellant was wearing a shirt.

Nissen, Mathies, Edgar and Ringler all followed appellant upstairs to his bedroom. Mathies testified that after coming out of the bathroom, appellant said that he had "killed her," and "had to do James, too." He reported that "[h]e blew their heads off with a gun," and that Cynthia's head "looked like spaghetti." He had shot James Bell "a couple of times in the back" after missing with his first shot. According to Nissen, appellant "kind of smiled" and asked him if he "had ever seen what a .357 does to someone's head at close range." When Nissen shook his head "[n]o," appellant said "It's not pretty." Referring to Cynthia Bell, appellant stated "we wouldn't have to worry about her anymore." When appellant announced that the Bells "were taken care of," Edgar asked him if he "had done" Cynthia. Appellant said, "Yes." According to Edgar, appellant said he told Cynthia "she shouldn't have fucked with him," and told James "he was sorry" before shooting him. Like Nissen, Edgar also testified that appellant commented that "you couldn't imagine what a .357 would do . . . [t]o somebody's skull." Appellant pulled a nickel-plated .357 gun out of the gun case and unloaded it. The gun contained four spent shells and two live shells, which both Edgar and Nissen described as .357 "wadcutters." Appellant asked Nissen if he wanted to clean the gun. When Nissen declined, appellant handed the gun to Edgar, who cleaned it for him. Both Nissen and Edgar testified they saw what appeared to be blood on the gun. In addition, Mathies saw blood on appellant's wrist watch, which appellant also asked Edgar to clean off.

Both Mathies and Edgar Fry testified that appellant and Edgar discussed what to do with appellant's bloody clothes. Edgar told appellant that if he "did do it," then "he better get rid of his clothes." Edgar volunteered to take them with him when he left. At first appellant resisted the idea, because he had few pairs of pants and the ones he was wearing "were good pants." Eventually appellant gave Edgar a paper bag, which Edgar assumed contained appellant's clothing. He disposed of it in a dumpster. He knew that he could get in trouble for destroying evidence, but did it because he wanted to help his brother. Appellant left the house again around 11:30 p.m., saying he was going to the Chevron station to "make a transaction." Appellant returned about 20 minutes later. Edgar left appellant's house between 1:00 and 2:00 a.m. that morning.

Nissen spent the night at appellant's house. The next morning, appellant asked him to help take the camper shell off appellant's pickup truck. Appellant was in a hurry; he told Nissen he "didn't

> want people to recognize the truck." While they were working on the truck, appellant told Nissen "that he shot [Cynthia Bell] and her boyfriend." Appellant described shooting Cynthia once in the head from the driver's side of the car, after which James Bell had turned toward appellant, put his hands in the air, and said "What the fuck are you doing." Appellant then demonstrated how he had shot James three times, " 'pop, pop, pop.' " Nissen did not report appellant's confession when the police questioned him about the murders on October 28 as they served a search warrant on appellant's residence, because appellant was his friend, and he "didn't want him to get in trouble." In addition, Ringler and appellant both told Nissen that, if asked, he should say appellant was home at the time of the murders. A "couple days" later the police returned to the house to talk with Nissen, and threatened to arrest him for possession and use of methamphetamine. At that point, Nissen decided to tell the police what he knew in order to avoid arrest. On cross-examination, Nissen admitted reading press accounts of the killings before he spoke to the police. However, he testified he never felt threatened by the police to tell anything but the truth, and that he did tell the truth.
>
> Like Nissen, Mathies did not contact the police despite her knowledge of appellant's involvement in the murders. She testified she did not contact the police and initially denied knowing anything because she "was scared." She denied changing her story because the police had threatened to arrest her and take her children away. When she first heard appellant threaten to kill Cynthia Bell, Mathies did not believe it, and simply thought it was "an expression." On cross-examination, Mathies testified that Nissen was not in the bedroom when appellant was cleaning up after the killings.
>
> Edgar Fry testified that during a conversation with appellant after the police first searched appellant's residence and seized his clothing, appellant told Edgar that he had thrown the .357 into the bushes at the Chevron station after he drove by his house and saw police activity there. Appellant said someone named "Mike" picked up the gun for him. A few days after the killing, while they were working on a car together, appellant told Edgar that he had the power "[t]o give or take life." Appellant told Edgar to "[j]ust keep [his] mouth shut" if contacted by the police. Edgar intended to do so, until contacted by the police and offered immunity for telling what he knew. The police never asked him to say anything but the truth, and never threatened him other than to tell him what he "was up against."

Exh. D to Answer, pp. 8-13.

Petitioner contends that defense counsel presented the trial court with substantial evidence that Nissen, Fry and Mathies had been coerced by law enforcement and by the

prosecution, in the form of transcripts of recorded statements to police and transcripts of testimony from prior judicial proceedings. AP, p. 46, citing CT 710-746; 758-777. Petitioner accurately summarizes the substance of defense counsel's in limine motion before the trial court to exclude the testimony of the three witnesses at issue:

> October 26 or 27, 1992: The Bells are killed. "The only person who claims to have witnessed the shootings was discounted and ignored by police. (The eyewitness, if believed, would clear defendant.)" CT 778.
> October 27, 1992: Officer Donald W. Wallar of the Vacaville Police Department speaks to Lynn Ann Ruiz. Office Wallar claims that Ruiz said that Fry told her, on October 26, 1992, that he was upset with Cynthia Bell and that he had said that he was going to blow her head off. "M[s.] Ruiz' taped statement made the day after next does not support [O]fficer Wallar's version of her statement.)"
> October 28, 1992: "[P]olice executed [] a search warrant [at] the home of defendant Fry. Fry [is] also subjected to a lengthy interrogation. But since neither the interrogation [n]or the search reveal[] anything...incriminating...John Fry [is] released." (CT 779.) Shannon Nissen is interviewed. He denies having any incriminating information concerning Fry. (CT 780.)
> October 29, 1992: The Bells roommate, Randy Raddosevich, is arrested. Detectives Michael A. Wood and William Rodda of the Vacaville Police Department interrogate Raddosevich. The detectives make "it clear that they [are] looking for dirt on John Fry." Wood threatens Raddosevich: "'The only way you're going to walk out of here, Randy, is if whatever you got to tell me is on the same wave length.' (Taped statement of Randy Raddosevich with Detective[s] Wood and Rodda on 10/29/92.) Mr. Raddosevich had nothing negative to say about John Fry and was not released from jail." (CT 779).
> October 30, 1992: "[P]olice pick up David Sparks, who was with John Fry...on October 26, 1992. Sparks t[ells] police that he was about ready to take off since he thought that the evidence was pointing to him. Yet police assure []Sparks not only that they [are] not interested in [him] but inform [] Sparks that John Fry [is] the murderer. They further inform[] Sparks (falsely) that defendant was the one trying to blamed [sic] the murders on Sparks." (CT 779.)
> November 2, 1992: Police go to Fry's home without a warrant. There, they encounter Shannon Nissen, who had been staying at the home. He is "under the influence of illegal drugs." The police threaten Nissen "with arrest for the drug charges and on the homicide charges but not [sic] charges [are] filed against Nissent [sic] when he agree[s] to give a statement against defendant Fry." (CT 780.)
> November 4, 1992: Nissen gives the police a "statement

> implicating Fry in the homicides.... Nissen, who [would] previously [have been] homeless except for the generosity of defendant Fry, [is] then put up in hotels by the police and his meals and other matters [are] taken care of ...." (CT 780-781.) The police go to "Edgar Fry's home. Edgar [is] very intoxicated.... Police threaten[] to arrest Edgar as an accessory to the homicides if he [does] not give a statement implicating his brother in the homicides. Police let Edgar know what they want[] him to say and Edgar say[s] what they want[]." (CT 781.)
> November 5, 1992: Police contact Debbie Mathies. After "Debbie at first denie[s] that she kn[ows] anything, police officers threaten[] to take her to jail and take away her kids if she [does not] tell them what they 'already' [know]. Many threats are on the police tape of the conversation." (CT 781.)
> Additional/Subsequent Coercion: Police suggest to Edgar Fry "that he not change any of his statements and that he not speak to the defense attorney...." Shannon Nissen tells people that the "police originally convinced him to make a statement against Fry by telling Nissen that Fry was going to kill Nissen and Nissen's friends." (781.)

AP, pp. 47-48.

The First District Court of Appeal set forth the following analysis with respect to the claim that coerced testimony had been improperly admitted:

> Appellant argues the trial court erred by permitting the testimony of prosecution witnesses Edgar Fry, Debbie Mathies and Shannon Nissen to be admitted because it was allegedly "coerced" by the law enforcement authorities. In support, appellant points to evidence that each of these witnesses originally told the police that appellant was not involved in the murders, and did not begin to cooperate "until their own personal interests required them to implicate him."
> This argument fails. When appellant first raised it at trial, the trial court reviewed all the transcripts provided by defense counsel of the witnesses' prior testimony at appellant's earlier trials. The trial court noted that although the police informed the witnesses they could be charged as accessories in connection with this case, there was also evidence the police pressed them only to "tell the truth." The trial court concluded that although there were certainly evidentiary questions going to the credibility of these witnesses, there simply was insufficient evidence they had been coerced to bar their testimony from admission altogether.
> A defendant has only a limited right to exclude the testimony of third parties on the ground that it was coerced. In any motion to exclude the testimony of a third party witness on grounds of coercion, the defendant bears the burden of proving that (a) the witness was improperly coerced; and (b) the reliability of the

> witness's testimony was actually impaired by the coercion. (People v. Badgett (1995) 10 Cal. 4th 330, 346-350; People v. Douglas (1990) 50 Cal. 3d 468, 500.) Although the claim that a witness's statement to the police was involuntary is subject to independent review on appeal, when faced with conflicting testimony in the record a reviewing court must accept the version of the event most favorable to the People. (Badgett, supra, 10 Cal. 4th at pp. 350-352; People v. Howard (1988) 44 Cal. 3d 375, 394.) The record in this case fully supports the trial court's determination. The jury heard both the initial versions of the facts given to the police by Nissen, Mathies and Edgar Fry, and their subsequent statements inculpating appellant. All three witnesses acknowledged they knew of their exposure to charges relating to drugs or complicity in the facts of this case, but specifically denied being subject to police threats, pressure or coercion to say anything other than the truth. There is nothing inherently coercive about confronting a suspect with the legal predicament he or she is in, or with an offer to release from custody or refrain from prosecuting the suspect in return for his or her cooperation with a police investigation. (Badgett, supra, 10 Cal. 4th p. 355; Douglas, supra, 50 Cal. 3d at p. 502, fn. 7.) Nothing more coercive than that occurred in this case. Ultimately, the question was one of credibility. The jury had before it all of the relevant evidence, and was in the best position to judge the credibility of these witnesses. There was no error.

Exh. D to Ans., pp. 66-67.

Because there is no Supreme Court case which speaks directly to the issue presented, petitioner relies on Chia v. Cambra, 281 F.3d 1032, 1037 (9th Cir. 2002), wherein the court stated: "Ninth Circuit case law may be persuasive authority for deciding whether a state court decision unreasonably applied Supreme Court precedent...."

It is true that the opinions of inferior federal courts "may be persuasive authority for purposes of determining whether a particular state court decision is an "unreasonable application" of Supreme Court law, and also may help determine what law is "clearly established." Duhaime v. Ducharme, 200 F. 3d 597, 600-01 (9th Cir. 2000). See also Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003).

> This does not mean that Ninth Circuit case law is never relevant to a habeas case after AEDPA. Our cases may be persuasive authority for purposes of determining whether a particular state court decision is an "unreasonable application" of Supreme Court law, and also may help us determine what law is "clearly

> established." See MacFarlane v. Walter, 179 F.3d 1131, 1139 (9th Cir.1999) (looking to Ninth Circuit caselaw to confirm that Supreme Court case clearly establishes a legal rule); citing O'Brien v. Dubois, 145 F.3d 16, 25 (1st Cir.1998) (holding that "to the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue").

Duhaime v. Ducharme, 200 F.3d 597, 600-601 (9th Cir. 2000). Notwithstanding, the Ninth Circuit has recently cast doubt on the efficacy or significance of this sort of persuasive authority, finding that a petitioner's "reliance on Ninth Circuit or other circuit authority is misplaced." He must show that the California Court of Appeal decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court*." Arredondo v. Ortiz, No. CV-01-00788-ABC, 2004 WL 834782, at * 2 (9th Cir. Apr. 20, 2004) [emphasis in original].

Citing only out-of-circuit authority, petitioner contends that "a criminal defendant may challenge the voluntariness of a witness statement offered by the government 'not based on any violation of [the witness'] constitutional rights, but rather as a violation of [his or] her own Fourteenth Amendment right to due process.'" AP, p. 48, citing, inter alia Clanton v. Cooper, 129 F.3d 1147, 1158 (10th Cir. 1997); United States v. Merkt, 794 F.2d 950, 961 (5th Cir. 198); United States v. Chiavola, 744 F.2d 1271, 1273 (7th Cir. 1984); United States ex rel. Cunningham v. DeRobertis, 719 F.2d 892, 895-896 (7th Cir. 1983); United States v. Fredericks, 586 F.2d 470, 481 (5th Cir. 1978). See also Buckley v. Fitzsimmons, 20 F.3d 789, 795 (7th Cir. 1994) ("Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's confession at another's trial violates his rights under the due process clause").

Petitioner predicates his specific Fourteenth Amendment claim as to the allegedly coerced testimony exclusively on "the principles set forth in La France v. Bohlinger, 499 F.2d 29 (1st Cir. 1974)." AP, p. 49. In La France, the defense objected to the introduction of a statement signed by a witness attesting to the defendant's guilt in a hit-and-run incident, when the same

witness testified in support of defendant's alibi at trial. Id. The witness testified that at the time he made the statement that he had been threatened by police and "that the statement was, in effect, a police fabrication signed because he was strung out on drugs, frightened, and willing to say anything to get back to his cell....and persisted in maintaining that it was false." La France, 499 F.2d at 31.

The First Circuit found that the trial court or a separate jury should have first determined the voluntariness of the statement to police before allowing the trial jury to determine its credibility, relying on Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964) and Lego v. Twomey, 404 U.S. 477, 485-486, 92 S.Ct. 619, 624-625 (1972). [See also Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246 (1991) (finding coercion in a confession where the state conduct instilled a fear for safety in the defendant)]. In Lego, the Supreme Court noted that whether or not a coerced defendant's confession was reliable or true in Jackson was not the central issue, rather, the high court "feared that the reliability and truthfulness of even coerced confessions could impermissibly influence a jury's judgment as to voluntariness." Lego v. Twomey, 404 U.S. at 485, 92 S. Ct. at 624. What was at issue was whether or not the confession, true or false, was coerced, because use of such a confession "offends constitutional principles" due to the "method used to extract them." Id. As the La France court frames the issue, "[a]t stake is not 'improving the reliability of jury verdicts'... but screening out evidence which, if found to be induced by coercion, is unacceptable regardless of its truth or untruth." La France, 499 F.2d at 33. Thus, the case was remanded to state court for that court to independently determine whether the statement at issue was coerced, the government having the burden to prove an absence of coercion by a preponderance of the evidence; should the court, after hearing the evidence determine the statement not to have been coerced, the judgment would stand. La France, 499 F.2d at 36.

However, once again, petitioner is up a Due Process creek without a Supreme Court paddle. It is tempting to find, as have many pre-AEDPA circuits, that the established

prohibition against coercing a *defendant's* confession can be extrapolated to witnesses as well. If the undersigned were writing on a clean slate, he might so find. But the fact is that the United States Supreme Court has had two occasions to take up the matter and has declined to address the issue both times over vigorous dissents. Bradford v. Michigan, 394 U.S. 1022, 1023-24, 89 S. Ct. 1638, 1639-40 (1969) dissent from denial of certiorari (Warren, Douglas and Marshall, JJ, quoting the dissent of Justice Rutledge in Malinski v. New York, 324 U.S. 401, 430-31, 65 S.Ct. 781, 795 (1945) ("'due process does not permit one to be convicted upon his own coerced confession. It should not allow him to be convicted upon a confession wrung from another by coercion. A conviction supported only by such a confession could be but a variation for trial by ordeal.'") Moreover, the establishment, or expansion, of an exclusionary rule is not a slight matter. In the AEDPA context, new exclusionary rules should be left to the Supreme Court and not the inferior courts.[15]

If left to his own devices, the undersigned would order an evidentiary hearing to ferret out actionable coercive conduct, if any. However, AEDPA does not permit the claim to be recognized regardless of the facts. Mention must also be made that even if an evidentiary hearing found actionable coercion, prejudice on this record is not a given. In this case, none of the witnesses repudiated their earlier statements implicating petitioner, but as the court has seen in its review of the extensive trial testimony, petitioner's trial counsel read into the record before the jury portions of police interviews and prior testimony from the witnesses not entirely consistent with the testimony they offered at the third trial, emphasizing earlier concessions by the witnesses that they felt pressured by police. Nevertheless, the strength of any coercion on the witnesses becomes much more doubtful—the third time around. How much could testimony in

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[15]As a postscript to the denial of certiorari in Bradford, the district court in Michigan granted a habeas petition based on the coerced testimony of a witness which was then upheld by the Sixth Circuit. Bradford v. Johnson, 354 F. Supp. 1331 (E.D. Mich. 1972) *aff'd.* 476 F.2d 66 (6th Cir. 1973) (on the grounds set forth in the district court opinion). However, this decision did not depend on the existence of extant Supreme Court authority.

the *third* trial have been the product of coercion taking place prior to the first trial. However, the court need not finally address prejudice in the absence of a cognizable claim.

This claim should be denied.

C. Petitioner's Sixth Amendment Right to Confront the Witnesses Against Him Was Violated When Petitioner's Right to Cross-examine the Key Witness Against Him, His Brother, Was Impermissibly Restricted (Including Alleged Threats Made to the Brother)

In his third claim, petitioner contends that the trial court abridged petitioner's Sixth and Fourteenth Amendment rights by unduly restricting petitioner's cross-examination of Edgar Fry, petitioner's brother, a key prosecution witness. AP, p. 51, Traverse, p. 4.

The state's First District Court of Appeals analyzed this claim as follows:

> [A]ppellant maintains the trial court improperly restricted his cross-examination of prosecution witness Edgar Fry, thereby allegedly denying appellant's constitutional rights to confront and cross-examine the witnesses against him. As in the case of his other arguments, appellant is wrong.
>
> Appellant asserts the trial court prohibited him from "fully exploring" four "areas related to Edgar's credibility": (1) the threats allegedly made to him by the police; (2) problems in Edgar's relationship with appellant; (3) questions about Edgar's state of mind at the time of the murders, including his alleged depression, drinking and drug abuse problems; and (4) questions about whether Edgar obtained the factual information to which he testified from his own personal knowledge or from the police. According to appellant, the trial court improperly "restricted defense questioning in each of these areas, over defense objection; on the grounds "there had already been adequate testimony in those areas." Yet appellant does not provide any specific examples of questions he asserts were proper, but which were improperly disallowed by the trial court.
>
> Under the Sixth Amendment of the United States Constitution, a defendant has the constitutional right to confront the witnesses against him and to cross-examine his or her accusers. Nevertheless, a trial court retains broad discretion over the conduct of trial. Included within this discretion is the power to impose reasonable limits on cross-examination, in order to preclude repetitive, confusing, and unduly harassing interrogation. Thus, the Confrontation Clause simply guarantees an opportunity for effective cross-examination; it does not guarantee an opportunity to cross-examine in whatever way, and to whatever extent, the

> defense might wish. (Delaware v. Van Arsdall (1986) 475 U.S. 673, 679-680; Davis v. Alaska (1974) 415 U.S. 308, 315-316.) As long as the cross-examiner has the opportunity to place the witness in his or her proper light, and to put the weight of the witness's testimony and credibility to a reasonable test which allows the jury fairly to appraise it, the trial court may permissibly limit cross-examination to prevent undue harassment, expenditure of time, or confusion of the issues. (Davis v. Alaska, supra, 415 U.S. at p.318; Evans v. Lewis (9th Cir. 1988) 855 F.2d 63 1, 634 ; Steele v. Perez (7th Cir. 1987) 827 F.2d 190, 193-194.)
>
> Appellant's failure to cite any examples of questions he contends the trial court should have permitted him to ask Edgar Fry is fatal to his present argument. Contrary to appellant's vague assertion of improper restrictions on his cross-examination of Edgar, the record actually shows defense counsel was given ample opportunity to inquire into all of the subjects he cites in his brief on appeal. Thus, the trial court permitted defense counsel to question Edgar on his state of mind and usage of drugs and alcohol around the time of the murders. Under cross-examination, Edgar conceded he was depressed about his separation from his wife, and had been using drugs and alcohol. Defense counsel also questioned Edgar at great length about the supposed threats made to him by the police. Similarly, defense counsel cross-examined Edgar concerning his relationship with his brother with repeated questioning about whether they had a "good" relationship, how much time Edgar spent at appellant's house, whether the two "clicked," whether Edgar told police he did not "give a 'F' about" appellant, and whether Edgar ever called appellant "a kick in the dirt as far as I'm concerned." Finally, defense counsel was permitted to question Edgar at length about whether the information to which he testified "originated" with the police as opposed to his own personal experience and observation.
>
> On this record, appellant has utterly failed to establish that any unconstitutional restrictions were placed on his cross-examination of Edgar. To the contrary, the record demonstrates that, as to every subject now cited by appellant as an example of one on which his cross-examination of Edgar was unduly restricted, he actually asked many probing questions and was barely restricted in his cross-examination at all.

Exh. D to Ans., pp. 67-69.

In his petition before this court, petitioner divides into three specific areas the inquiry from which he alleges he was foreclosed:

> (1) Edgar's assessment concerning the degree to which his judgment was impaired when he was being interrogated by the police (RT 2140-2141), (2) the nature and closeness (or lack

> thereof) in the relationship between the Fry brothers (RT 2158, 2307), and (3) certain aspects of the influence on Edgar occasioned by suggestive police questioning and police threats. (RT 2148-2149, 2154-2155, 2225, 2301-2303).

AP, p. 58.

Petitioner quotes at length the on-the-record statement petitioner's trial counsel made to the court (outside the presence of jury) during her cross-examination of Edgar Fry. AP, pp. 51-52, citing RT 2243-2245. In addition, defense counsel submitted points and authorities on the admissibility of evidence of threats. AP, p. 51, n. 68, citing CT 844-846.

Having noted that the state appellate court faulted appellate counsel on direct appeal for failing to cite specific examples of questions that should have been allowed (AP, p. 55), petitioner sets forth examples of the trial court's limitation of the cross-examination. Petitioner commences with a first category speaking to the witness' "sobriety, state of mind and judgment" during the initial police interrogation of Edgar Fry on November 4, 1992, in which Edgar "testified" that he was under the influence of marijuana, heavily under the influence of alcohol, "'emotionally down'" and not in a happy period of his life. AP, p. 52, citing RT 2139-2141.

> Q: [S]o at the time you talked to the police officers, you were not in the state to exercise the best of judgment; isn't that true?
> [Prosecutor]: Objection, vague. Calls for speculation.
> The Court: Sustained.

RT 2140.

> Q: Isn't it true that you were in such a state at the time you talked to the police officers of intoxication that you could not exercise the best of judgment?
> [Prosecutor]: Objection, the question has been asked, and the objection sustained.
> The Court Yes. I'll sustain the objection to that. You can ask him what he did, and then we can make a determination as to whether or not he was able to do what he did.

RT 2141.

As to the second category, concerning the nature of the witness' relationship to his brother, petitioner includes the following exchanges:

| | |
|---|---|
| Q: | Isn't it true that you never talked to your, uh— to John Fry[,], brother to brother[,] in your whole life? |
| [Prosecutor]: | Objection, relevance. |
| The Court: | Sustained. |
| [Prosecutor]: | Vague. |
| [Defense]: | I would like to put this one on the record, Your Honor. |
| The Court: | It's on the record. It was sustained. |
| [Defense]: | Isn't it true that you've had a lot of disagreement with your brother? |
| [Prosecutor]: | Objection, relevance. Vague. |
| [Defense]: | Your Honor, he said that his relationship was pretty good. I have a right to challenge that. |
| The Court: | Well, I think I'll sustain the objection to the form of the question. I mean, he could have had an argument when he's four years old. I don't know if that's relevant to the trial. .... |

AP, p. 53, RT 2158.

| | |
|---|---|
| Q: | Isn't it true, Mr. Fry, that you even wished the police good luck in prosecuting your brother? |
| [Prosecutor]: | Objection, relevance, hearsay. |
| The Court: | I'll sustain it. That doesn't go to bias. Sustained. |

AP, pp. 53-54, RT 2307.

In the third category, alleged police threats against as well as police "spoon-feeding" of, Edgar Fry, petitioner sets forth the following:

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|---|---|
| Q: | [P]rior to the first [trial]... didn't ... Officer Wood and another officer come to your house and threaten you not to change your testimony? |
| A: | They told me that if I didn't stick with the truth that they could throw me in jail for contempt, yeah. |
| Q: | Well, they didn't always use the word "truth," did they? |

.....

A. Yeah, they did.

.....

Q: [Looking to] your police statement of January 6th, 1993... [t]he officer didn't use the word, "truth," did he?

[Prosecutor]: Objection, hearsay.

[Defense]: Your Honor, it's for impeachment. He said that they did each time.

The Court: I'm going to sustain the objection.

AP, p. 54, RT 2148-2149, 2154-2155.

Q: And it was pretty clear to you when you were talking to the police officers on January 8th that they— that's what they wanted to hear about the statement of what a .357 could do to a skull; isn't that true?

[Prosecutor]: Objection, calls for speculation.

The Court: Sustained.

[Defense]: Talking about his state of mind.

[Prosecutor]: She's asking about the officer's state of mind.

[Defense]: No, I'm asking---

The Court]: I sustained the objection.

AP, pp. 54-55, RT 2225.

Q: Now, you said you were given immunity, but you were told you had to tell the truth; is that correct?

A. Yes.

Q: But the person who was deciding that truth was supposedly the District Attorney; isn't that true?

[Prosecutor]: Objection.

The Court: Sustained.

[Prosecutor]: Objection, Your Honor.

The Court: Not relevant, sustained.

.....

Q: [D]uring that immunity agreement, wasn't there also— didn't the ... Assistant District Attorney also tell you that if you wanted immunity, you couldn't sit there and jack the prosecution around?

[Prosecutor]: Objection, asked and answered.

The Court: Sustained.

[Defense]: Your Honor, I haven't asked this before.

The Court: Well, we've talked about that enough.
[Defense]: The DA---
The Court: I'm going to sustain the objection.

AP, p. 55, RT 2301-2303.

Half-buried within respondent's argument, respondent notes that only in his habeas petition does petitioner provide the specific examples of disallowed questions, which the state appellate court deemed "fatal" to petitioner's (as appellant) argument. Citing Anderson v. Harless, 459 U.S.at 6[, 103 S. Ct. at 277] and Vasquez v. Hillery, 474 U.S. at 260[, 106 S. Ct. at 622], respondent makes only a single and passing reference to petitioner's having failed "to fairly present the factual basis of the claim to the state courts." Ans., pp. 16-17. Respondent's failure to develop any non-exhaustion argument and the half-hearted manner in which it is raised are such that petitioner is not even given sufficient notice to address it. While any such argument with respect to this claim is not explicitly waived by respondent (28 U.S.C. § 2254(b)(3)), respondent only pressed the contention that it is petitioner's failure to have sought an evidentiary hearing on the coerced testimony claim (claim 2) that rendered the amended petition unexhausted, which contention the court has addressed. Moreover, the cases cited do not militate for a finding of non-exhaustion in the context of this claim.

As to the merits, respondent's reasoning tracks the state appellate court's analysis; respondent also specifically contends that at the beginning of cross-examination, defense counsel was allowed to get testimony in as to Edgar Fry's state of mind and drug and alcohol use during the period when he was approached by police, with the concession that he was drinking heavily and separated from his wife, as well as the concession that "'it wasn't the happiest time of my life,'" and an admission to marijuana use. Ans., p. 17, RT 2138-2140. The undersigned notes that the record also indicates that the court itself sought to clarify that Edgar Fry stated that he had been drinking heavily and had used marijuana at the time of the November 4, 1992 police interview:

> The Court: All right. And you're saying at the time of that interview, Mr. Fry, you had consumed alcohol to such an extent that you were under the influence of alcohol?
> The Witness: Yeah.
> The Court: All right. And in addition to using alcohol on the date and at the time of this first interview at your parents' house on November 4th 1992, you had also consumed marijuana along with the alcohol?
> The Witness: Yeah.

RT 2241:7-16.

Respondent asserts that petitioner asked a number of questions about the relationship of the brothers, whether it was "'good,'" whether the witness often visited petitioner's house, whether the two "'clicked,'" whether he had called petitioner "'a kick in the dirt.'" Ans., p. 17, RT 2157-2160.

The witness was also asked by the defense about whether information "'originated'" with the police with his prior answers read back to him. AP, p. 17, RT 2222-2223, 2288, 2297.

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." The "'exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" Davis v. Alaska, 415 U.S. 308, 316-17, 94 S. Ct. 1105, 1110 (1974) (Sixth Amendment right to confront witnesses required that defendant be allowed to challenge a witness with evidence of a possible motive for his alleged misidentification). See also Redmond v. Kingston, 240 F. 3d 590, 591-92 (7th Cir. 2001) (where defendant was accused of statutory rape, exclusion of victim's prior false allegation of rape violated confrontation clause because it excluded evidence that victim had "a motive for what would otherwise be an unusual fabrication").

A "defendant's right to present evidence is not absolute; he must comply with established rules of evidence and procedure." Carriger v. Lewis, 971 F. 2d 329, 333 (9th Cir. 1992). A criminal defendant "does not have an unfettered right to offer [evidence] that is

incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Montana v. Egeloff, 518 U.S. 37, 42, 116 S. Ct. 2013, 2017 (1996) (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 653 (1988)). Hearsay rules, for instance, "prohibit the introduction of testimony which, though unquestionably relevant, is deemed insufficiently reliable." (Id.) Further, the Confrontation Clause does not prevent trial judges from imposing limits on cross-examination. Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435 (1986) ("the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish" (quoting Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 294 (1985) (per curiam ) (emphasis in original)). In fact, "a trial judge retains 'wide latitude' to limit defense counsel's questioning of a witness without violating a defendant's Sixth Amendment rights." Carriger, 971 F. 2d at 333; Michigan v. Lucas, 500 U.S. 145, 149, 111 S. Ct. 1743, 1746 (1991).

After reviewing the record, the undersigned concludes that petitioner's trial was not rendered fundamentally unfair[16] because of the trial court's evidentiary rulings on petitioner's trial counsel's efforts to cross-examine his brother, the witness Edgar Fry. While the record shows that the trial judge did, indeed, curtail some of defense counsel's lines of inquiry, and, in fact, was on the face of it simply wrong, in ruling, for example, that the witness' apparent good wishes to the police in the prosecution of his brother did not go to bias, that is not the applicable standard under AEDPA. It is also true that the trial judge simply sustained an objection for which no legal basis was offered. Traverse, pp. 42-43. The record of the cross-examination demonstrates that petitioner was able to impeach and undermine the credibility of the witness with transcripts from earlier testimony and police interviews on a variety of issues. A trial judge being wrong on several occasions in sustaining objections to a defense counsel's cross-

[16]Because the alleged lack of confrontation resulted from evidentiary rulings to specific questions, the court utilizes an Estelle fundamental fairness analysis. If no confrontation whatsoever had been allowed, e.g., in a child rape case where a child is not exposed to direct cross-examination, the analysis might have taken on a different form.

examination cannot be construed, in these circumstances, as depriving petitioner of adequate cross-examination.

Another way of looking at the same issue is even assuming that the trial court's curtailment of the cross-examination was an unconstitutional restriction, as petitioner observes, such a restriction would be subject to a harmless error analysis. Traverse, p. 58, fn. 74.

> A Confrontation Clause violation is subject to harmless error analysis. See Delaware v. Van Arsdall, 475 U.S. 673, 681-84, 106 S.Ct. 1431[] (1986); United States v. Bowman, 215 F.3d 951, 961 (9th Cir.2000). Under Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710 [] (1993), habeas relief is proper only if any error by the state courts "had [a] substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 637, 113 S.Ct. 1710.

Hernandez v. Small, 282 F.3d 1132, 1144 (9th Cir. 2002).

The trial record reveals that petitioner's trial counsel engaged in a comprehensive, substantive and lengthy cross-examination of witness Edgar Fry. The witness admitted to being intoxicated by both alcohol and marijuana at the November 4, 1992 interview, from which a reasonable juror could, even would, infer impaired judgment even if not expressly admitted. Moreover, it is unlikely that this point could have been developed further to much effect, the witness having conceded the point.

Moreover, as noted, defense counsel was able to demonstrate, despite the witness' denials on the stand, that in discussions with police, he had denigrated his brother. Petitioner's not being permitted to fully develop any remoteness and/or alienation from or animosity and/or bias witness Edgar Fry may have felt against his brother, while somewhat troubling, actually conceals very little from the jury, as, after all, the witness was forced to concede that he had called his brother a "kick in the dirt" on the record.

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Defense counsel's questioning forced petitioner to concede that he had said under oath that he had been threatened by police.[17] Petitioner was also given ample room to probe whether or not police "fed" the witness. As an example, in the section cited by petitioner of improperly curtailed cross-examination about who originated the comment about "what a .357 could do to a skull," defense counsel was able to point out that the statement was not made by the witness until January 8, 1993, some two months after he had been speaking with the police, that just before the police asked him whether or not petitioner had made such a statement, the witness stated that he could not remember what petitioner had said other than intimating that he had killed the victims. RT 2222-2225.

The finding of the state appellate court, that petitioner's trial counsel was provided ample opportunity to probe the witness is substantiated by the record, and to the extent that she was unconstitutionally limited, if at all, this court finds that the petitioner does not demonstrate that the restrictions "had [a] substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 637, 113 S. Ct. 1710. The state court's denial of this claim was neither contrary to, or an unreasonable application of, clearly established federal law. This claim should be denied.

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[17] "Q. In March 1994, did you testify about the threats that the police made to you?"
A. Yes.
Q. In January of 1993, did you testify about the threats that the police had made to you?
A. Yes.
Q. And in November of 1994, October, November, did you testify about the threats the police had made to you?
A. Is that another one of the trials?
Q. Yes.
A. Yeah."
RT 2149-2150.

D. Petitioner Was Denied His Right to Present a Defense by Exclusion of Testimony of a Witness Who Overheard a Third Party Confession to the Murders

Petitioner claims to be innocent of the murders of which he has been convicted. AP, p. 2; Traverse, pp. 5-6. As noted, petitioner's first two trials ended in hung juries. AP, p. 2. Jury deliberations in the third trial spanned five weeks, with jurors at one point declaring themselves deadlocked with a 7-5 split. AP, p. 2; CT 664-667[18]; RT 5154.6. An eyewitness, a truck driver, Russell Carter, a neutral party who knew neither the victims nor the defendant, testified that he had been driving by as the shootings occurred, saw the man who perpetrated the murders and that that individual was not petitioner. AP, pp. 2, 4, 13-16; RT 4578, 5154.6; Traverse, p. 6. Petitioner declares that while the jury in the third trial was allowed to hear the Carter testimony, jurors were not allowed to hear the testimony of Pamela Marie Maples concerning the confession of her cousin, Anthony Hurtz, the person petitioner claims to be the actual shooter. AP, p. 4. Hurtz was a drug dealer (AP, pp. 4-5; RT 3994, 4065, 4485), whose killing of the victims was purportedly drug-related. AP, p. 5. Petitioner asserts that Anthony Hurtz repeatedly confessed to different people that he had perpetrated the killings. AP, pp. 22-26; RT 3995-3999, 4138-4145, 4156-4158, 4229-4230; Traverse, pp. 44-52.

Petitioner maintains that exclusion of testimony from a witness that another individual had confessed to the killings at issue in this case resulted in a deprivation of petitioner's "fundamental constitutional right to a fair opportunity to present a defense," Traverse, p. 44, fn. 21, quoting Crane v. Kentucky, 476 U.S. 683, 687, 106 S. Ct. 2142, 2145 (1986).

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, Chambers v. Mississippi, [410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973)], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925 [] (1967); Davis v.

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[18] As already noted (see footnote 5), the court cannot locate pages 660-667 of the clerk's transcript in the record submitted in this matter.

> Alaska, 415 U.S. 308, 94 S.Ct. 1105 [] (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."

Crane v. Kentucky, 476 U.S. at 690, 106 S. Ct. at 2146.

Petitioner[19] contends that Anthony Hurtz killed the victims at the behest of an

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[19] "Appellant testified in his own defense. In October 1992, he owned a 1977 '[p]owder blue' Ford pickup truck with a white camper shell. At the time he also owned five guns, including a Ruger .357-magnum. Appellant denied killing either Cynthia or James Bell, threatening to do so, or talking with anyone about having done so.

Appellant testified that he began selling drugs to support his own methamphetamine habit after he was fired from his truck driving job in September 1992. He was not very successful at it, and was 'slowly losing ground.' Appellant met Cynthia Bell because she was a friend of his girlfriend, Ringler. He would 'front' one-sixteenth of an ounce of methamphetamine to Cynthia, who would in turn 'cut' the drug, divide it into smaller parcels, and then pay him back after selling it herself. Although Cynthia was in debt to appellant for as much as $700, appellant claimed she would always pay him back. Just before she was murdered, Cynthia owed him between $150 and $170. Appellant claimed that he never threatened Cynthia about the money she owed him.

Appellant described the incident on October 23, 1992, in which Cynthia Bell 'entered my house without asking, or broke into the house, however you want to say it.' He claimed that he did not get angry at Cynthia; instead, he was 'more amused' by the incident. After Cynthia found him in his bedroom, he 'fronted' her a quantity of methamphetamine, injected her with some of the drug, and then socialized with her and James Bell. He claimed that after that, everything 'was fine' between them.

Appellant had known Murphy from going to school with her between 1966 and 1979. He started selling drugs to her in October 1992. Murphy introduced appellant to Bernal about one week before October 26. Through Bernal, appellant also became reacquainted with Daryl Borelli, whom appellant had known in high school. Bernal served as a conduit for drug purchases by appellant from Borelli. On October 25, Borelli brought two ounces of methamphetamine to appellant's house. They had never dealt personally with each other before. Later that night, Borelli came over to appellant's house again. They talked in appellant's bedroom about the 'games' Bernal was playing, and decided that from then on Bernal would not serve as a 'middleman' for them. According to appellant, Borelli told him that as long as he had Murphy and Cynthia in his business, he 'was going to have problems,' and Cynthia 'shouldn't even be able to breathe the air that we do.' Appellant denied saying anything negative about Cynthia to Borelli or twirling a gun around in his presence.

Appellant acknowledged driving Murphy out into the country on October 24, 1992. He claimed he was merely taking the 'rural route' to Davis. According to appellant, Murphy was 'hysterical,' so he simply let her talk for a while. Then he began to question her about a tape recording he had heard of a suspicious conversation between Murphy and Bernal. Appellant denied threatening to kill Murphy at any time or pointing a gun at her. According to appellant, he simply 'decided to play a little game,' and shot his gun out of the truck window twice. Appellant next saw Murphy on the morning of October 26, when, according to him, she called to ask him to pick her up at a friend's apartment in Davis. When he arrived, he became irritated because no one was there. He kicked the door, and it 'flew open.' He then went in and sat on a couch, thinking 'somebody would show up sooner or later.' When Murphy arrived, appellant left a note apologizing for the damage to the door.

Appellant asked Murphy to contact Ruiz because he wanted to ask her advice about how to get along with heavy methamphetamine users. He denied making any threats against the Bells or anyone else while talking with Ruiz. He 'could have said something' to the effect that he felt 'like just blowing them away,' but he was only 'laughing and joking,' and not directing the comment 'toward any one person.' Appellant decided he 'didn't want to deal in drugs anymore,' because he 'didn't want to put up with the games that were being played,' and was planning on 'cutting everybody loose,' including Cynthia. He did not want to talk to Cynthia or have anything to do with her, although she would continue to be welcome in his house because of her friendship with Ringler. Appellant denied making any arrangements with Cynthia to meet her at the intersection of Interstate 505 and VacaValley, or anywhere else that day.

Sparks arrived at appellant's house with 'another kid' whom appellant did not know between 5:30 and 6:00 p.m. on October 26, 1992, and tried to sell appellant a .357 special. Appellant did not buy it because it was damaged. According to appellant, Sparks said he had some money and was looking for an ounce of methamphetamine. Because he did not want to deal in his house, appellant told Sparks to wait in a nearby park while appellant tried to find some drugs. Appellant and Bernal left in appellant's pickup truck at the same time Sparks left. When Sparks proceeded onto the freeway instead of toward the park, appellant followed close behind and blinked his headlights. They pulled over, and agreed that Sparks would come with appellant to look for methamphetamine while Bernal went with Gibeau and then met them at a gas station in an hour. Once appellant found some methamphetamine, however, Sparks was no longer interested in buying it and instead asked appellant to take him to Vacaville. Appellant declined, saying he would take Sparks to the agreed rendezvous. According to appellant, Sparks 'was so spun, he couldn't talk.' After driving around for awhile looking for someone to purchase Sparks' gun, appellant stopped at the gas station and got out to telephone Ringler, leaving his own .357 gun on or under the seat. When appellant returned to the truck, Sparks was gone. Appellant did not see Sparks leave; he assumed Bernal had picked him up. Appellant did not check to see if his gun was still in the truck.

Appellant testified that after Sparks left, Bernal and Gibeau arrived and talked with him for about 20 minutes before leaving. John Peterskoff and Manuel Michel, two of appellant's former trucking acquaintances, also pulled up at the gas station. After drinking beers and socializing with them for at least an hour, appellant telephoned Ringler at approximately 7:00 p.m. Thereafter, he 'shot up,' and drove home 'very slowly.' When he got home, he 'pulled into the driveway and sat there for a while,' 'trying to maintain control' and 'get a focus.' After Mathies, Nissen and Ringler asked him if he 'was going to come inside or just sit out there all night,' he came inside with his briefcase and his shirt on. Because appellant "was pretty spun" on drugs at that point he 'didn't even think about' his gun, even though it was his normal custom always to retrieve his gun from the truck and bring it into the house with him in the briefcase or some other holder. Appellant went upstairs, put down his briefcase, and went into the bathroom. He denied changing his clothes or having any blood on him. A few minutes later, someone came to the bedroom and informed appellant that Michel was there to see him. Michel stayed for about an hour talking with appellant and taking drugs. Between 10:00 and 10:30 p.m., in response to two telephone calls, appellant went to the nearby Chevron station to supply Pete and Shannon Joy with methamphetamine. After about 20 minutes, appellant came home and went to sleep.

The next morning, appellant asked Nissen to help him take the camper shell off of his pickup truck because he wanted to save gas mileage. He denied telling Nissen he did not want anyone to recognize the truck, or saying anything to Nissen about the victims. Appellant claimed to have asked Nissen to take his gun from his briefcase, and to put it

individual named Darryl Borelli, with whom he met, as established by several defense witnesses, at a Denny's in order to plan the homicides, that Borelli wanted Cynthia Bell killed due to a drug debt and/or "'rip off,'" and that Borelli and Hurtz made a number of incriminating admissions concerning the murders. AP, p. 59.

In their unpublished opinion, the First District Court fairly set forth the facts (RT 4136- 4145), as well as their reasoning, as to this claim:

> Defense witness Pamela Marie Maples testified that Hurtz was her cousin. According to Maples, while at her sister's house in Vallejo in April 1994 she "overheard" Hurtz discussing some homicides. After the trial court sustained the prosecution's objection to the

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behind the seat of the truck. According to appellant, his 'last clear recollection' of the gun was seeing in [sic] on the seat of his truck while he was talking with Sparks. He assumed the gun was in his briefcase because it was his usual habit to put it in the briefcase when he got out of the truck and went into the house. Appellant conceded that his usual custom was to have a trigger lock on the gun, and that it would have to be removed for the gun to be used.

[Footnote 5] On October 28, 1992, the police found a trigger lock in a gym bag on the passenger floorboard of appellant's pickup truck.

Appellant also admitted he lied to the police when asked when he had last seen his .357. Appellant denied asking Turner to get rid of his gun.

[Footnote 6]Appellant testified he did not know Turner, and was introduced to him the first time when Turner came with Ringler to pick him up at the police station. According to appellant, he did not ask Turner to 'get rid' of his gun because 'I didn't even know Mike Turner. I wouldn't ask somebody I didn't know to do something like that.'

Appellant denied telling Carter that he killed the Bells. According to appellant, Carter asked him whether he killed someone in Yolo County and whether he 'did the two in Vacaville.' After 'playing with [Carter's] mind' and 'having fun' with him a bit, appellant told him 'No, but they sure think I did.' Appellant claimed he fled from the police when they tried to arrest him because he "had no intentions on going to prison for three counts of murder that I didn't do."

Appellant denied confessing to Jacobitz or giving him any information about the Bells' murder. According to appellant, Jacobitz was a known 'liar'; appellant was suspicious of him because he asked too many questions about appellant's case and wanted to read all of appellant's newspaper clippings. Appellant let Jacobitz read some newspaper clippings, which Jacobitz kept for several days. However, appellant would not let Jacobitz read the police report because he mistrusted him. Appellant thought Jacobitz may have heard him talk with other inmates about how witnesses had testified at his earlier trials. Appellant testified that while in the county jail law library, Jacobitz offered to help him by having Edgar killed. Appellant rejected the offer, saying he just wanted Edgar 'to tell the truth,' i.e., that Edgar 'had been threatened' by the police to give testimony against appellant. On cross-examination, appellant admitted that he gave Edgar's address to Jacobitz. According to appellant, he "didn't think [there] was any harm" in doing so even though Jacobitz claimed to be a member of the Aryan Brotherhood and had offered to have Edgar "done in," because Jacobitz was 'a liar.'" Exh. D to Ans., pp. 20-25.

admission of Maples' testimony as to what she heard Hurtz say, the defense made an offer of proof that Maples overheard him say he had killed a man and a woman in a car in Vacaville, and was covered with blood as a result.

Under questioning outside the presence of the jury, Maples testified that she was present with her sister, Hurtz, and "a guy named Steve" at a conversation in which Hurtz allegedly said he had killed a man and a woman in a car. Maples was "in and out of the room" at the time, only heard "bits and pieces" of the conversation, and never joined in it. The conversation was already underway when she came in; she did not know how long they had been discussing the murders, the context of the discussion, or whether it was "serious" or not. Nevertheless, Maples testified that Hurtz said he shot "[t]he girl" "[i]n the head" first, and "[t]then he reached over and shot the guy." Hurtz said they were in a parking place, but did not otherwise describe the locale of the murders or the type of car the victims were in. Afterward, according to Maples' version of what Hurtz said, "he was full of blood" and "ran through a field, threw mud upon himself, and then went to make the phone call for somebody to pick him up." Maples "didn't hear" Hurtz say when the murders took place. Under cross-examination, she acknowledged that she had no idea whether the murders took place one week or 10 years before the conversation, or whether they took place in California or somewhere else.

The trial court sustained the prosecution objection, stating the defense had failed to establish sufficient foundation to permit Maples to testify as to the alleged statements of Hurtz, because there was insufficient evidence to connect the details of the incident allegedly described by Hurtz to the facts of the murders at issue in this case.

Exh. D to Answer, pp. 55-56.

APPLICABLE LAW

A criminal defendant has the right to present evidence of third party culpability if it is capable of raising a reasonable doubt about the defendant's own guilt. (People v. Hall (1996) 41 Cal. 3d 826, 833; People v. Von Villas (1992) 10 Cal. App. 4th 201, 264.) However, a trial court is not required to permit the admission of any evidence, however remote, to show a third party's culpability. "[T]here must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (Hall, supra, 41 Cal. 3d at p. 833; see also People v. Clark (1992) 3 Cal. 4th 41, 131: Sandoval, supra, 4 Cal. 4th at p. 176.)

The mere possibility that some third person committed the crime is not enough. In order to place reasonable limits on the trial of

collateral issues and avoid undue prejudice to the People from unsupported jury speculation on the possible guilt of other suspects, there must be some competent and substantial proof of a probability that this actually happened. (People v. Green (1980) 27 Cal. 3d 1, 22, overruled on other grounds in Hall, supra, 41 Cal. 3d at p. 834, fn. 3; People v. Perry (1980) 104 Cal. App. 3d 268, 272; People v. Whitney (1978) 76 Cal. App. 3d 863, 869-870.) Even if a defendant's evidence is found to raise a reasonable doubt, the evidence may still be excluded in the discretion of the trial court if its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion of the issues. (§ 352; Hall, supra, 41 Cal.3d at pp. 829, 834, Von Villas, supra, 10 Cal. App. 4th at p. 265.) An appellate court should not disturb the trial court's exercise of its wide discretion in making this determination unless there has been a manifest abuse of discretion resulting in a miscarriage of justice. (People v. Milner (1988) 45 Cal. 3d 227, 239; People v. Harlan (1990) 222 Cal. App. 3d 439, 446.)

DISCUSSION: NO ABUSE OF DISCRETION

The trial court did not abuse its discretion in excluding Maples' testimony in this case. Even if her testimony was fully credited, there was simply insufficient evidence to connect the murders she heard Hurtz describe, with the ones at issue here. Although Hurtz allegedly said he shot a man and a woman sitting in a car in a "parking place," Maples did not know when or where the killing occurred, or even if Hurtz was seriously describing an act he had himself committed. There was no mention of Cynthia or James Bell, and indeed no identification of the alleged victims' of Hurtz's murders at all.

Given the absence of any actual linkage to the charged offenses, or any other evidence supporting an inference that the killings allegedly described by Hurtz were those of Cynthia and James Bell, Maples' testimony simply did not tend to show appellant's innocence. In view of the total lack of identifying information linking the alleged uncharged offense and the charged crimes, the evidence was insufficient to raise a reasonable doubt. The trial court's ruling was an appropriate exercise of its discretion under section 352. (Davis, supra, 10 Cal. 4th at p. 502; Pride, supra, 3 Cal. 4th at p. 238; Clark supra, 3 Cal. 4th at pp. 132-133; Von Villas, supra, 10 Cal. App. 4th at pp. 266-267.)

> [Footnote 17] At any rate, no possible prejudice could have occurred to appellant as a result of the exclusion of Maple's testimony. As seen, the trial court had already permitted appellant to introduce the very similar testimony of both Harmina Ross and Eliane West regarding Hurtz's alleged confessions of shooting two unidentified people at close range while the victims were sitting in a

> parked car near Vacaville. Maple's testimony to similar effect was merely cumulative.

Exh. D to Answer, pp. 56-57.

Petitioner argues that the exclusion by the trial court of Maples' testimony violated petitioner's right to due process and right to present a defense. He contends that only she could not be impeached or shown to be biased as had other third party culpability witnesses. AP, pp. 66-67. While the Supreme Court recognizes a right to present a complete defense, that right is restricted "to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973). Where the preferred evidence of third-party culpability simply affords a possible ground of suspicion against a third party and does not directly connect that person with the actual commission of the offense, the evidence may be excluded. See People of Territory of Guam v. Ignacio, 10 F.3d 608, 615 (9th Cir. 1993) (quoting Perry v. Rushen, 713 F.2d 1447, 1449 (9th Cir. 1983)).

To evaluate whether exclusion of evidence reaches constitutional proportions, the court must balance five factors: "(1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense." Tinsley v. Borg, 895 F.2d 520, 530 (9th Cir. 1990). A criminal defendant must demonstrate that his interest in presenting evidence in his favor outweighs the state's interest in reliable and efficient trials before a court should interfere with routine evidentiary matters. Perry v. Rushen, 713 F.2d 1447 (9th Cir. 1983). Only "particularly crucial and reliable evidence" will satisfy this test; "[e]vidence of little importance, whether merely cumulative or of little probative value, will almost never outweigh the state interest in efficient judicial process." Id. at 1453. Applying these factors to the case at bar, this court finds that the

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trial court did commit constitutional error when it excluded the evidence discussed above. [20]

Evidence of her cousin's (Hurtz's) alleged remarks to her sister and another person, overheard in part by Maples, about Hurtz's involvement in the double murders are of the type generally deemed to be inherently reliable, as a declaration against interest, and such remarks would constitute, if believed, substantial evidence that another person or persons committed the crime, which was petitioner's defense. See Chambers v. Mississippi, 410 U.S. at 302, 93 S. Ct. at 1049. Moreover, respondent does not dispute that Maples, as Hurtz' cousin, was the only third party culpability witness who had no apparent bias.

Respondent asserts, however, that the witness' testimony would have been seriously undermined on cross-examination due to the weaknesses inherent within it. There is no doubt that the testimony would have been subject to rigorous cross-examination and the uncertainties highlighted, including that Ms. Maples did not know when or where the murders to which Hurtz was alluding occurred, that she only heard "bits and pieces" of the conversation, that she could not even be sure the conversation was serious. RT 4139, 4140, 4141- 4142, 4144. However, there is a much more compelling case for relevance of the testimony than the state trial and appellate courts credited. Although the offer of proof regarding Maples is in parts imprecise, certain significant points match or closely parallel some of the key circumstances of the case at issue. AP, pp. 47-48. Both victims had been shot to death; victim Cynthia Bell had been shot in the head; the victims were in a car, parked in a turnout area; evidence showed she was in the driver's seat and James Bell was in the passenger seat and that the shooter was standing outside the vehicle's driver side; testimony revealed that the shooter would have been covered in blood. Id., citing RT 574, 587, 666-667, 687, 845, 848-849, 1472-1476; 1495-1521. Just how many

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[20] As set forth in subsequent sections, it is difficult to understand whether the claim to be analyzed is a "preclusion of defense" or an Estelle evidentiary error. The court has chosen the tack that when evidence or testimony as a whole has been excluded, the better mode of analysis is the "preclusion of defense" line of authority. In those instances where not the entire testimony has been precluded, but only specific answers to specific questions, the Estelle evidentiary error framework is more appropriate.

double execution style homicides involving a female driver shot in the head and a male passenger also shot in a parked car could there be in a community proximate to the victims' murder herein? When asked where Hurtz was living some two and half years prior, which was around the time of the Bell murders in Vacaville, Maples knew that Hurtz had been living in the vicinity of Sacramento, then Fairfield. Traverse, pp. 47-48; RT 4137, 4140, 4141, 4143. Moreover, petitioner is correct that the state appellate court's reasoning that there was no "other evidence supporting an inference that the killings allegedly described by Hurtz were those of Cynthia and James Bell," is a statement that is insupportable on the record of this case no matter how narrowly it is construed where seven other witnesses (Chantelle Eittreim (via reading of transcript of prior testimony), Candida Eittreim, David Eitrreim, Kenneth Keith, Harmina Ross, Eliane Patricia Ross, George W. McCleese, Jr.) specifically link Hurtz to the deaths of the Bells. AP, pp. 64-68 & fn. 91; RT 3993, 3995-3999, 4008, 4038, 4069-4070, 4088-4089, 4099, 4104-4106, 4156-4158, 4167-4175, 4230, 4247, 4249, 4435, 4439-4440, 4442-4445, 4484-4485, 4487, 4502-4503. Most of these witnesses were either Hurtz's former girlfriends or family members of the former girlfriends. Although not all seem to have been asked, none of these witnesses appear to have testified, with the exception of Kenneth Keith, that they even knew petitioner. RT 3993-3994, 4154, 4228, 4484, 4752.

In short, the evidence of third-party culpability ....was sufficiently "crucial or reliable" to outweigh the state's interest in exclusion of untrustworthy evidence. The proffered evidence was not on its face so collateral to the issue of third party culpability that its exclusion did not violate the Sixth and Fourteenth amendments. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038 (evidence that another person had confessed to the crime improperly excluded); Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920 (1967) (testimony of convicted co-defendant which would have necessarily exonerated the defendant improperly excluded); United States v. Armstrong, 621 F. 2d 951 (9th Cir. 1980) (exclusion of evidence that another man, matching description of the robber, had used bait money from the robbery to purchase a car improperly

excluded)). The jury should have been permitted to evaluate the testimony, which would have been subjected to probably rigorous cross-examination. For the state appellate court not to recognize the trial court's error was an unreasonable application of clearly established law as set forth by the Supreme Court.

However, the question that remains is whether or not, under Brecht vAbrahamson, 507 U.S. 619, 113 S. Ct. 1710 (1993), the error was harmless. Under Brecht, it must be determined whether or not the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht, 507 U.S. at 623, 113 S. Ct. at 1714. In a case where the trial ended in a hung jury twice before and in this case where the jury was nearly deadlocked before ultimately reaching a verdict after five weeks, petitioner would have it that any error imposed a "substantial and injurious effect" on the verdict. However, petitioner himself noted that the testimony at issue was not set before the earlier juries which ended in mistrial because Maples had not been located; those two trials, nonetheless, each ended in a mistrial, without the evidence that was improperly excluded in the third trial. The court cannot help but emphasize that the previous mistrials occurred in the absence of Maples' testimony. Respondent is correct that petitioner presented a number of defense witnesses attesting to Hurtz's and Borelli's culpability. The same corroborative value attributable to Maples' testimony that is a part of the constitutional error analysis in petitioner's favor, nevertheless cuts against petitioner when determining whether the exclusion of Maples' testimony was harmful. The defense witnesses' implicating Hurtz, who were heard by the jury, were more exact and precise in their testimony and alleged far more damning detail, notwithstanding any bias and/or impeachment the prosecution was able to show. Thus, the jury did hear a good bit of evidence regarding Hurtz' alleged involvement. Moreover, respondent is correct that she could not have emerged completely unscathed by a cross-examination that would have pointed up the infirmities of her putative testimony, as noted above. While this court cannot conclude, as did the state appellate court that "no possible prejudice" could have ensued as result of the exclusion of the testimony,

the court does find that there has been an insufficient showing that the improper exclusion of the testimony of Ms. Maples had a substantial and injurious effect on the jury's verdict. Habeas relief should be denied for this claim.

E. The Trial Court Unduly Restricted Fry's Presentation of Evidence to the Jury Regarding the "Actual Killer's" (Hurtz) Prior Convictions; Hurtz Testified, and the Trial Court's Exclusion of the Evidence Regarding His Past Gave the Jury a False Impression of Hurtz

Petitioner, as respondent notes, with no briefing or discussion whatsoever attempts to incorporate this claim into his amended petition and his traverse, solely by reference to the original pro se petition, which sets forth no statutory or case authority for this putative ground for relief, and to the briefing on direct review before the state courts, which briefing references only state case law with a passing reference to the federal and state constitutions. AP, p. 84; Ans., p. 21, Traverse, p. 53, Petition pro se, p. 5(d), ;Exh. A to Ans., Appellant's Opening Brief, pp. 88-92; Exh. C, Appellant's Reply Brief, pp. 18-21; Exh. E, Petition for Review, pp. 20-21.

A bare contention, unsupported by explanation or authority, is deemed waived. See FDIC v. Garner, 126 F.3d 1138, 1145 (9th Cir. 1997) (claim waived when no case law or argument in support is presented); Seattle School Dist., No. 1 v. B.S., 82 F.3d 1493, 1502 (9th Cir. 1996) (party who presents no explanation in support of claim of error waives issue); see also Pelfresne v. Village of Williams Bay, 917 F.2d 1017, 1023 (7th Cir.1990) ("A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority . . . forfeits the point. We will not do his research for him."); Johnson v. Indopco, 887 F. Supp. 1092, 1096 (N.D. Ill. 1995) (finding argument unsupported by relevant authority, or by demonstration of why it is a good argument despite lack of authority, constitutes mere assertion not meriting court's attention); Arredondo v. Ortiz, No. CV-01-00788-ABC, 2004 WL 834782, at * 2 ("Normally we decline to address an issue that is simply

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mentioned but not argued [citation omitted], and we see no reason to depart from that practice in a habeas appeal.").

This ground for habeas relief, in the form of a bare and unsupported contention, presented as it is without supporting explanation, argument, or authority in this court, has, in essence, been abandoned. Having been so abandoned, the claim is mooted and must necessarily be denied.

F. In Violation of Fry's Fundamental Constitutional Right to Adduce Third Party Evidence, the Trial Court Precluded Fry from Presenting Evidence to the Jury that an Accomplice of Hurtz Had Admitted to Being in Possession of the Murder Weapon

Petitioner contends that he was unconstitutionally deprived of the opportunity to present third party culpability evidence before the jury when the trial court did not allow defense investigator, Robert Morse, to testify that a third party witness, Debra Neundorf, had admitted to being untruthful in her testimony in averring that witness Darryl Borelli, her former boyfriend and the individual on whose behalf petitioner believed Hurtz and possibly others were acting in murdering the Bells, had not told her he had possession of the murder weapon. AP, pp. 84-86. As petitioner emphasizes, his defense has always been that he did not commit the murders. AP, p. 84. Darryl Borelli was "another local methamphetamine dealer to whom Cynthia Bell owed money." Opinion, First District Court of Appeals, Exh. D to Ans., at 27.

Borelli, *called by the defense*, testified that he took no part in the Bell murders, that he had made no statements to anyone about his having disposed of the murder weapon, that he did not have anything to do with the disappearance of petitioner's .357. AP, p. 85, RT 2794-2795, 2800. The state court of appeal summarizes the facts undergirding this claim accurately (with a minor correction noted by this court):

> Appellant next contends the trial court erred in refusing to allow him to impeach the stipulated testimony of his own defense witness Debra Neundorf by means of alleged prior inconsistent

statements and statements against penal interest. Although we believe the trial court erred in its analysis of the question whether Neundorf's alleged out-of-court statements were made against her penal interest, we conclude that any possible error in denying their admission was not prejudicial.

PROCEDURAL BACKGROUND

Debra Neundorf was called as a defense witness at both of appellant's prior trials. The defense was unable to call her in person as a witness at this trial because she was declared unavailable, having invoked her Fifth Amendment rights due to an arrest prior to trial. The parties therefore stipulated that her testimony from the second trial could be read into evidence. Pursuant to this stipulation, Neundorf's direct, cross, redirect and recross examinations from the prior trial were all read into the record. In that testimony, Neundorf testified that although she had previously dated Borelli, she was not dating him in October 1992; she never sold drugs to Cynthia Bell on Borelli's behalf, she never heard Borelli make threats against the Bells; Borelli never told her he was responsible for the Bells' murders or that he had the murder weapon; Borelli had never threatened her to dissuade her from testifying; and she was not afraid of Borelli. Appellant also questioned Neundorf on whether she had told defense investigator McClellan she was dating Borelli in October 1992.[21]

Several days after Neundorf's previous trial testimony was read into the record, defense counsel called one Robert Morse to impeach Neundorf with new testimony that while recently in jail custody, she told Morse she had been untruthful in her prior testimony, she was very afraid of Borelli, and Borelli had told her he had the murder weapon. The prosecutor objected on the grounds Morse's testimony about Neundorf's alleged recent statements was hearsay offered for proof of the facts asserted; Neundorf was unavailable to be cross-examined about her conversation with Morse; and, because the recent statements to Morse were made long after Neundorf's earlier trial testimony, she necessarily could not have been examined at that time so as to give her an opportunity to explain or deny her alleged subsequent statements. The trial court announced it would sustain the objection unless the defense could establish some legal right to present the new testimony.

The following colloquy took place: MR. KEALY

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[21] According to the transcript of the testimony, petitioner's counsel had asked whether Neundorf had told Lou Kalish, a criminal investigator for the Solano County District Attorney's Office, not defense investigator McClellan, that she and Borelli were dating at the time of the homicides (October, 1992). RT 4416, 4428.

[the prosecutor]: She's not available for cross-examination on these. The Court has declared her unavailable as a witness. I don't know whether she's going to come in and say I never talked to Mr. Morse about this. She's never been asked, did you tell Mr. Morse these things.

THE COURT: Okay. I'm going to sustain the objection subject to if you can find me some law. But my feeling is we declared her to be unavailable. Now, she's testified by way of stipulation from her prior trial, and I think you're stuck with that. If you have some law that says otherwise, give it to me. We'll address it . . .

MR. KEALY: Your Honor, if I may, just because counsel has some case-

MS. VOSS [defense counsel]: I don't understand the grounds for sustaining it. It's impeachment. Just because she's unavailable-she wasn't unavailable when this, uh, conversation took place. She said it, and she was cross-examined as to these matters.

MR. KEALY: There's been no testimony cross-examined as to anything she told Mr. Morse. We read her testimony in a couple weeks ago. Apparently, if I'm right, this happened with Mr. Morse within the last week?

THE WITNESS [Morse]: Yes.

MR. KEALY: The last couple of days?

THE WITNESS: Last few days. But she was cross-examined on these matters, and she said something different. This is impeachment.

THE COURT: No, that wouldn't be fair. In other words, you read in the testimony and then you go investigate, get something different. She's not around, and how can the other side, whether it was one way or the other, . . . confront the witness? That's the real problem.

At a further hearing on the matter the next day, defense counsel argued Morse's testimony should be admitted on two grounds: (1) because during her previously transcribed testimony at the earlier trial Neundorf was cross-examined on similar statements concerning Borelli she allegedly made to a different defense

investigator, the defense had already satisfied any confrontation requirements for the admission of her subsequent statements to Morse as prior inconsistent statements; and (2) Neundorf's alleged statements to Morse that she had been untruthful in her trial testimony were separately admissible as declarations against penal interest. The prosecutor responded that Neundorf had only been cross-examined about her earlier alleged statements to defense investigator McClellan, and had not had the opportunity to be confronted with her alleged statements to Morse. The trial court noted that "the real question" was the "fundamental fairness" of permitting one side to stipulate to the previous testimony of a witness, and then contradict that testimony with hearsay statements made after the fact while the witness was unavailable to testify.

The trial court ultimately sustained the objection, concluding that the prior inconsistent statement exception to the hearsay rule "applies only when the person whose statement is being used is a witness and has an opportunity to explain or to deny the statement." The court also noted that the hearsay statements sought to be admitted were made subsequent to her testimony, and were therefore not "prior" inconsistent statements. With respect to the question of whether they were admissible as against Neundorf's penal interest, the trial court found that Neundorf's alleged admission that she was "untruthful" in her previous trial testimony lacked any evidentiary value because it could not be ascertained whether or not the subject as to which she allegedly stated she had not told the truth constituted a "material fact."

> The trial court stated: "Now she [Neundorf] makes a statement, according to Mr. Morse that he overheard, that [`] when I testified I wasn't telling the truth.[`] . . . [¶] I don't know if that would be to a material fact, to every fact, or to no fact, or to the way she spelled her name when she was asked how to spell her last name. And so I don't know what evidentiary value that has."

APPLICABLE LEGAL PRINCIPLES

[Discussion of California law]

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Regardless of the merits of that argument [another argument under California law], we have concluded the trial court erred in its analysis of appellant's alternative contention that Neundorf's statements to Morse should have been admitted under the exception for declarations against penal interest.

The trial court's stated reason for rejecting admission of Neundorf's alleged hearsay statements to Morse on this ground

was that there was insufficient evidence the statements were material. According to the trial court, it was impossible to tell what evidentiary value Neundorf's statements had because it was unclear what she was referring to when she told Morse she did not tell the truth at the prior trial.

Because materiality is an element of the crime of perjury, the prosecution's failure to prove it is fatal to a perjury charge. What is at issue here, however, is not the merits of a perjury claim, but the application of a particular hearsay exception to the admission of proffered out-of-court statements. As in the case of other hearsay exceptions, the essence of the exception for statements against interest is the declarant's state of mind at the time of making the subject statements. Specifically, the rationale of the exception is based on the assumption that reasonable persons would not say deleterious things about themselves if they thought doing so would be harmful to their interests. In this context, then, the question is not whether Neundorf's statements would ultimately be adjudged "material" and perjurious as a matter of law, but whether her statements could possibly expose her to a charge of perjury and therefore be considered contrary to her penal interest.

In this case, Neundorf purportedly admitted that she lied under oath. Even if she may ultimately have been acquitted of a perjury charge, her potential exposure to arrest, pretrial detention and criminal prosecution by itself is clearly contrary to her pecuniary interest, and certainly subjects her to the risk of criminal liability as well. Assuming Neundorf did lie under oath and admit that she had done so, it strains credulity to conclude she did not see herself at risk because she somehow had enough knowledge of criminal law to realize both that materiality was an element of the crime of perjury, and that no court would find her lies "material."

We conclude that a reasonable person in Neundorf's position would have thought of her admission of lying under oath as being against her interests, and her out-of-court statements therefore qualified for admission under that exception to the hearsay rule. Even so, the trial court could still have excluded the statements if it determined they were not sufficiently reliable or trustworthy. (People v. Cudfo, supra, 6 Cal. 4th at pp. 607-609; People v. Frierson (1991) 53 Cal.3d 730, 745.) Here, it does not appear the trial court made such a factual determination. We are loath to do so in the first instance on this appeal. Assuming the statements were sufficiently reliable, we therefore assume further that their exclusion was error.

That error, however, does not compel reversal; the question of prejudice remains. Assuming the trial court abused its discretion in barring the admission of this testimony, we may not reverse or set aside the judgment unless, in light of the entire record, we

> conclude the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) We cannot so conclude in this case.
>
> The body of evidence against appellant was extensive and compelling, as we have set out in some detail. Numerous witnesses testified appellant not only threatened the lives of the victims on several occasions during the days just before the killings, but he also acknowledged committing the murders soon afterward. At least one of the murder bullets was identified as having been fired from appellant's gun. Several witnesses saw that gun in appellant's possession both immediately before and immediately after the murders. Other than Neundorf's hearsay statement to Morse that Borelli told her he had the murder weapon, there was no other evidence Borelli ever had possession or control of the gun used to kill the victims. Even accepting Borelli's alleged statement to Neundorf at face value, there is nothing to indicate when he might have had possession of the gun, or what the circumstances of his possession were. Indeed, whether or not Borelli said he had possession of the murder weapon, nothing in appellant's proffer suggests he ever admitted committing the murders.
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> Finally, Neundorf's reported statements to Morse had obvious indicia of unreliability. Not only were Neundorf's statements hearsay, but they were themselves chiefly concerned with alleged double hearsay statements by Borelli concerning his supposed possession of the murder weapon. Appellant's main reason for seeking admission of this double hearsay was as proof of the facts asserted. Thus, the reliability of both Neundorf and Borelli himself was placed in issue by Morse's proffered testimony. The testimony consists of jailhouse assertions that the declarant lied under oath during her previous testimony, which assertions the defense now seeks to admit as the truth without any chance for testing by cross-examination. Given her incarceration, Neundorf's motives for making the supposed admissions are certainly suspect. Under all these circumstances, there is only a remote chance a reasonable jury would have given substantial weight either to Neundorf's hearsay statements to Morse, or to the double hearsay statements of Borelli that Neundorf reportedly recounted. On this record, we conclude it is not reasonably probable that a result more favorable to appellant would have occurred in the absence of the trial court's error in articulating its reasons for denying admission of this evidence. (Cal. Const., art. VI, § 13; Cudjo, supra, 6 Cal. 4th at pp. 612-614; People v. Watson (1956) 46 Cal. 2d 818, 836.)

Exh. D to Ans., pp. 58-65.

Although the state appellate court found that it was a state law evidentiary error for Neundorf's testimony to have been excluded (albeit adjudged "harmless)," that is not the

analysis relevant in this court. The real federal issue is whether the exclusion of the impeachment testimony unfairly fettered petitioner's right to present a defense. And, this preclusion of defense has been discussed previously.

For the sake of efficiency, the court will assume that constitutional error occurred in not permitting the Neundorf impeachment. In assessing the Brecht standard,[22] the court is again compelled to determine whether exclusion of this evidence had a substantial and injurious effect on the outcome of petitioner's trial, i.e., is the court's confidence in the outcome of the verdict undermined. Like the Court of Appeal, the undersigned cannot agree with petitioner. Given the circumstances, petitioner overestimates the effect of the alleged impeachment. Petitioner called the "actual killer" [or his accomplice], Borelli, as a defense witness, then *stipulated* to the offending testimony of Neundorf, and lastly attempted to overcome all this with the testimony of a defense investigator recalling the "just the other day" contradictory statements of the non-appearing witness. Probably, petitioner hoped to dirty Borelli on direct, and apply the coup de grâce to both Borelli and Neundorf with the investigator's evidence of Neundorf's deceit which would then (hopefully) also rub off on Borelli. However, a reasonable jury would not have been persuaded by what is unconfrontable hearsay (regardless of any exception). While the

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[22] Petitioner emphasizes that the state court erred in applying the "harmless error" standard found in People v. Watson , 46 Cal. 2d 818, 836, 299 P. 2d 243, 254 (1956), which requires setting aside a judgment only upon a finding that, inter alia, " the improper admission or rejection of evidence," resulted in a "miscarriage of justice" which "should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." Watson, 46 Cal.2d at 834, 836. In arguing for the application of the Chapman harmless error test, petitioner concedes, correctly, that this court may be constrained to follow the prejudice inquiry set forth by Brecht. Traverse, p. 18. This circuit has unequivocally determined "that the Brecht standard should apply uniformly to all federal habeas corpus cases under § 2254." Bains v. Cambra, 204 F.3d 964 (9th Cir. 2000). The Ninth Circuit has also clarified that the Watson harmless error standard applied by California state appellate courts to trial errors of non-constitutional magnitude "is the equivalent of the Brecht standard under federal law...whether the errors had a 'substantial and injurious effect or influence in determining the jury's verdict.'" Bains, 204 F.3d at 971, n. 2, citing, inter alia, Duncan v. Henry, 513 U.S. 364, 366, 115 S.Ct. 887 [] (1995) (quoting Brecht v. Abrahamson, 507 U.S. 619, 636-38, 113 S.Ct. 1710 [](1993)).

tactic was within the reasonable bounds of counsel competence, it was a longshot, and in light of the entire record, not all that impressive.

This claim should be denied.

G. Trial Court's Exclusion of the Prior Acts of Violence of the Actual Killer's Accomplice Violated Fry's Right to Present a Defense

For the same reason that this court finds that petitioner has waived any argument in support of claim 5, the undersigned finds that petitioner has waived any argument as to this asserted ground for relief. In his amended petition, petitioner states only that this issue has been fully briefed "during the course of direct review, and in Fry's pro se petition." AP, p. 88. In the traverse, in response to respondent's apparently unacknowledged opposition, petitioner asserts only "[t]his issue has been adequately briefed in Fry's post-conviction briefing and in the Attorney General's Answer," submitting the issue "without further briefing." Traverse, p. 61. No case authority is cited in the pro se petition as to this claim. Petition, p. 5(e). Moreover, petitioner's briefing on direct appeal to the state courts did not provide adequate argument and case authority to frame a claim that petitioner had been deprived of a federal constitutional right on this ground. Exh. A to Ans., pp. 93-100; Exh. C to Ans., pp. 22-26; Exh. E to Ans., pp. 4-8; 21-22.

As previously noted (see claim 5 discussion, supra), a bare contention, unsupported by explanation or authority, is deemed waived. See FDIC v. Garner, 126 F.3d at 1145; Seattle School Dist., No. 1 v. B.S., 82 F.3d at 1502; see also Pelfresne v. Village of Williams Bay, 917 F.2d at 1023; Johnson v. Indopco, 887 F. Supp. at 1096. Arredondo v. Ortiz, No. CV-01-00788-ABC, 2004 WL 834782, at * 2 (court declines to address an issue that was only mentioned but not argued). Because petitioner has not briefed this ground for relief in this court, it is a bare contention without supporting argument or authority and is deemed abandoned and/or waived. Having been waived, this claim has been rendered moot and must necessarily be denied.

H. Trial Court Violated Fry's Sixth and Fourteenth Amendment Rights by Directing the Jury to Continue Deliberating, When, after Nine Court Days of Deliberations, the Jury in the Third Trial Had Declared That it Was Deadlocked 7 - 5, with Nine of the Jurors Informing the Court That Further Deliberations Would Be of No Avail

Petitioner maintains that the trial judge compelled jurors, who had participated in extensive deliberations and had informed the court that, by a large majority, they believed themselves to be deadlocked, to reach a verdict in violation of petitioner's constitutional rights to due process and to a fair trial. The state court of appeal fairly sets forth the facts of this claim, with any necessary modification noted:

> On May 16, 1995, after 11 days of deliberations,[23] the jury sent the trial court a note from the foreperson stating that she believed "we are deadlocked at this point," and asking the trial court: "Do you have any suggestions for us regarding what we might do to break the deadlock?" The trial court called the jury into the courtroom and asked the foreperson whether (a) if the jury continued in its deliberations, the foreperson thought there was a reasonable possibility that the jury might arrive at a verdict; and (b) whether there was anything further the trial court could do to assist the jury in arriving at a verdict. The foreperson responded that the jurors were "just looking for . . . anything that the Court might suggest that we could try to do to break, the deadlock." The trial court inquired how the jury was split, and was told that after four votes, the jury was split seven to five.
>
> The trial court admonished the jurors that each party had a right to the jurors' own individual opinions; "everybody is entitled to their own opinion as a juror"; the jurors should "unhesitatingly change" their votes if they were shown to be wrong during deliberations; "until you are convinced that you are wrong, then you should stick to your vote"; "if a verdict can be reached, then we want a verdict to be reached"; and "[i]f a verdict can't be reached, then that's just the way it is." The trial court then polled the jury to determine whether they individually believed further deliberations would be useful. Seven jurors agreed with the foreperson that their deliberations [sic]"hopelessly deadlocked"; one "[h]esitantly" agreed; one was undecided; and two disagreed. On the basis of this poll, the trial court sent the jurors back to deliberate further,

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[23]In his traverse, petitioner correctly notes (at least according to the record) that the jury deliberated for nine (9) days rather than 11 days prior to the jury foreperson indicating that the jury might be deadlocked. Ap, p. 62; CT 929-936; RT 5123 - 5154-7.

> again instructing "that if you are convinced that you are wrong, then you should change, [but] if you are not convinced, . . . you should stick with you own vote. The trial court told the jurors it would check with them the next day "as to what, if any, progress" had been made, "and if not, then we can go from there again."
>
> At that point, the foreperson asked for further clarification of the concept of reasonable doubt. The trial court told the foreperson to reread the instruction, and added that "it's really you, as individual jurors, when you read that instruction, to apply it and then give it the meaning to which you feel it's entitled." Thereafter, the jury deliberated for two days without communicating with the court. On May 19, the jury requested a read back of some portions of trial testimony, and informed the court it had selected a new foreperson. On May 22, the trial court suggested making an inquiry about whether the jurors felt they were making progress, but the prosecutor objected on the ground that "[t]hey're obviously working," and "if they haven't brought the subject matter up with the Court, we shouldn't be bringing that up." The jury was brought in, and the new foreperson indicated the jury's willingness to continue deliberations the next day.
>
> On June 1, the trial court sua sponte asked the jury to come into the courtroom to inquire whether there had been any progress in the deliberations. At that time, the new foreperson stated: "Yes, there has been some change." The trial court reread CALJIC No. 17.40 instructing the jury that both sides were entitled to the individual opinion of each juror; each juror was to decide the case for him or herself, after discussing the evidence and instructions with the other jurors; and although each juror was not to hesitate to change an opinion if convinced it was wrong, he or she was not to decide any question in a particular way just because a majority of the jurors, or any of them, might favor such a decision. Upon seeing "all affirmative nods" from the jurors in response to its question whether further deliberation would be helpful, the trial court sent them back to deliberate. On June 8, the jury returned verdicts of guilty on both counts.

Exh. D to Ans., pp. 39-41.

Although as to this claim petitioner merely incorporates by reference his pro se petition and briefing on direct appeal in his amended petition, he does brief the issue in his traverse. Traverse, pp. 62-68. The pro se petition, without citing case authority, at least raises the issues sufficiently for respondent to have adequate notice such that the belated briefing in the traverse does not unduly prejudice respondent. Petitioner emphasizes the two prior mistrials as a

result of deadlocked juries; that daily deliberations in the third trial were scheduled from 9:00 a.m. to 5:00 p.m.;[24] that while evidence was presented to the jurors over 29 court days, the jury deliberated for 23 court days before reaching a verdict; that nine of the jurors on May 16, 1995, after being polled by the trial court, agreed that they were deadlocked and that further deliberations would be fruitless; that 14 of the days that jurors deliberated occurred after the majority of jurors believed the jury to be deadlocked. Traverse, pp. 62-63, CT 822-857; RT 5126, 5154-5 - 5154-8. Respondent points out that one of the nine who believed that the jury was hopelessly deadlocked expressed this belief "hesitantly"; of the remaining three jurors, one was undecided and two did not believe there was a hopeless deadlock. Ans., p. 28, RT 5154-7 - 5154-8.

Petitioner cites Supreme Court authority pointing out the risk that is run if jurors are inordinately pressured to reach a verdict following a deadlock after having made exhaustive efforts. Traverse, p. 65; Arizona v. Washington, 434 U.S. 497, 509, 98 S. Ct. 824, 832 (1978) (if a trial court judge fails "to discharge a jury unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.").[25] Petitioner cites Arnold v. McCarthy for the principle that "[c]oercion of an already exhausted jury to continue deliberations may induce jurors to accommodate a verdict which they would not otherwise support." 566 F.2d 1377, 1387 (9th Cir. 1978). While the theory of petitioner's cited cases is no doubt true in the abstract, the Ninth Circuit also observed (in Arnold v. McCarthy) the following

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[24] The record indicates that jurors had a lunch break of an hour and a half scheduled. RT 5126.

[25] Noting that the "public interest in fair judgments is not of recent origin," the high court quotes from an early case: "'if a jury cannot agree, we ought not to coerce them by personal suffering, nor ought we to expose the parties to the danger of a verdict which is not the result of conviction in the minds of the jury, but produced by suffering of mind or body.'" Arizona v. Washington, 434 U.S. at 510 n. 27, 98 S. Ct. at 832 n. 27 (quoting The Queen v. Charlesworth, 1 B. & S., at 503-504, 121 Eng. Rep. at 802..

in assessing whether the trial court had exhibited a proper exercise of discretion in declaring a jury deadlocked:

> Upon receiving a communication from the jury that it cannot agree, the trial court must question the jury independently to determine whether further deliberations might overcome the deadlock. [Citations omitted]. Merely questioning the jury foreman may not be sufficient, but this circuit has recently held that questioning the foreman individually and the jury either individually or as a group is satisfactory.

Id.

In this case, the record demonstrates that in determining not to declare a mistrial upon the jury's majority declaration that they were deadlocked, this court not only spoke with the foreperson, but also polled the jurors to determine each of their positions. The judge should question the jury in such circumstances, either individually or through its foreman, on the possibility its current deadlock could be overcome by further deliberations. The trial judge did not simply direct the jury to resume deliberations without any inquiry or further direction, as was the case in Krische v. Smith, 662 F.2d 177 (2d Cir. 1981), cited by petitioner as grounds for granting habeas relief. Traverse, p. 65.

Petitioner notes that prior to bringing the jury back to the courtroom on June 1, 1995, the court expressed concern that a juror had remarked to a court reporter during a testimony readback that "'if they [did not] reach a verdict by July 1st, she felt she might lose her job." Traverse, p. 64; RT 5233. The fact that a juror may have been concerned about whether or not her job would be in jeopardy if a verdict (or, presumably, at least some resolution) were not reached fully a month beyond when the judge makes his remark does not appear to lend itself to coloring the deliberations as coerced.

Upon bringing the jury to the courtroom on June 1, 1995, petitioner observes that the court made the following remark, despite the fact only two of the twelve jurors had definitively stated that the jury was not deadlocked:

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> [S]ome days ago when the jury indicated that it was deadlocked,...the court then made certain inquiries of the jury. And after that, *the jurors had indicated to the court that they felt that further deliberation would be fruitful*, and therefore the court returned the jury for further deliberation.

Traverse, p. 64; RT 5235 [emphasis added].

While it is plain that the court would have been more accurate to say that two, or possibly three, of the jurors had indicated the further deliberation could have proved fruitful, sending the jury back for further deliberation even after it has declared itself completely deadlocked is not, of itself, tantamount to coercion. Rodriguez v. Marshall, 125 F.3d 739 (1997), overruled on another ground by Payton v. Woodford, 299 F.3d 815 (9th Cir. 2002). In Rodriguez, the Ninth Circuit found that the jury had not been coerced where "the jury declared itself deadlocked on four occasions, and yet the judge refused repeated defense requests to declare a mistrial." 125 F.3d at 748-749.

A court must apply a "totality of the circumstances" test when considering whether a verdict was coerced by actions of the trial court. Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 365 (2002)[26]; Lowenfeld v. Phelps, 484 U.S. 231, 248-250, 108 S. Ct. 546, 556-557 (1988); Jiminez v. Myers, 40 F.3d 976 (9th Cir. 1994) (trial court's comments and conduct following two impasses in jury deliberations on attempted murder charge amounted to giving jury de facto Allen charge,[27] which instructs jurors to work toward unanimity and minority to reexamine its views, where the judge twice inquired into the jury's numerical split after they had declared that they were deadlocked, twice noted that he was looking for movement toward

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[26]Compliance with Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, however, "does not demand a formulary statement that the trial court's actions and inactions were noncoercive 'individually and cumulatively.' It suffices that that was the fair import of the Court of Appeal's opinion." Early v. Packer, 537 U.S. at 9, 123 S. Ct. at 365.

[27]Allen v. United States, 164 U.S. 492, 17 S.Ct. 154 (1896). The Supreme Court has noted: "California law, unlike federal law, prohibits the giving of a so-called Allen []charge to a deadlocked jury—that is, a charge that specifically urges the minority jurors to give weight to the majority's views." Early v. Packer, 537 U.S. 3, 6, 123 S. Ct. 362, 364 (2002) (citing People v Gainer, 19 Cal.3d 835, 852, 139 Cal. Rptr. 861 (1977).

unanimity, and refused to grant a mistrial where both the defense and prosecution agreed th . further deliberation would not be useful); Rodriguez v. Marshall, 125 F.3d 739 (verdict not coerced where the jury declared itself deadlocked on four occasions over the course of fifteen deliberation days and the trial judge refused repeated defense requests to grant a mistrial, trial judge commented on evidence which the jury had requested and remarked upon weaknesses in the testimony of one defense witness, and on the eleventh day of deliberations trial judge inquired into the numerical split of the jurors on the balloting and again denied a motion for a mistrial).

The state appellate court observed in this case:

> That record clearly shows the trial court did nothing to coerce the jury, and did not abuse its discretion in having the jurors continue their deliberations after inquiring into the numerical division of voting and individually polling the members in an effort to see if there was anything it could do to assist them in their deliberations to reach a verdict. The trial court made no threats or other statements that could be interpreted as exerting undue pressure on any juror; nor did it ever indicate that it was necessary for the jury to reach a verdict. The trial court never expressed an opinion on appellant's guilt or innocence of the charges; nor did it comment on the evidence. Indeed, appellant's assertions notwithstanding, the trial court specifically told the jury they were not required to return a verdict.
>
> > [Footnote 12] The trial court stated: "If after there's a vote or two votes or three votes or, as in your case, four votes, if you are shown that you are wrong or that the evidence does not support your vote, then you should, as the law says, unhesitatingly change. [¶] But until you are convinced that you are wrong, then you should stick to your vote, and that's what was carefully pointed out by both attorneys, and that's the law that I gave you during the instructions. [¶] So with that, the question then boils down, if you wish further deliberation, and you have been in deliberation for quite a period of time-and all of you, the Court knows, were very attentive throughout the trial. We went through a long time. . . . But if a verdict can be reached, then we want a verdict to be reached. If a verdict can't be reached, then that's just the way it is. It's not to-because everybody is entitled to their own

opinion as a juror."

> Thus, the trial court specifically reinstructed that (a) each party had a right to the jurors' own individual opinions and each juror was entitled to his or her own opinion; (b) each juror was to decide the case for him or herself, after discussing the evidence and instructions with the other jurors; (c) although the jurors should "unhesitatingly change" their votes if they were shown to be wrong during deliberations, they should not decide any question in a particular way just because a majority of the jurors, or any one of them, might favor such a decision; (d) "until you are convinced that you are wrong, then you should stick to your vote"; (e) the individual jurors should interpret and apply the instructions themselves; and (f) although a verdict should be reached if possible, "[i]f a verdict can't be reached, then that's just the way it is." The trial court only had the jury continue deliberations after it became apparent that some jurors believed further deliberations would be useful, and that it would be possible to reach a verdict. On this record, the trial court's actions were clearly not coercive and not an abuse of discretion. [Citations omitted.]

Exh. D, pp. 43-44.

Again, the undersigned does not consider the issue de novo, but ascertains whether the legal conclusion of the Court of Appeal was "unreasonable." The undersigned cannot say that it was. There is no evidence that the jury members believed they had to reach a particular verdict; the trial judge did not at any time pressure the jury to do so. Although the trial judge asserted that "[i]f a verdict can be reached, then we want a verdict to be reached," he added that "[i]f a verdict can't be reached, then that's just the way it is." RT 5154-7. While he advised jurors that "if you are shown that you are wrong or that the evidence does not support your vote, then you should, as the law says, unhesitatingly change," he also counseled that "until you are convinced you are wrong, you should stick to your vote...." RT 5154-6 - 5154-7. The court further notes that petitioner did not request a mistrial. Additionally, it is constitutionally permissible for a state trial judge to inquire into the numerical division of the jury, so long as the context of the inquiry does not suggest that the jurors were coerced into changing their views.

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See Locks v. Sumner, 703 F.2d 403, 406-7 (9th Cir.1983); Jiminez, 40 F.3d. at 981.[28] There is no evidence here that any juror was coerced to change his/her vote. Rather, it appears that the jurors reached an impasse at one point in a difficult case, later changed forepersons, continued to request and listen to testimony readbacks, and were ultimately able to reach unanimity. Even in light of the two earlier mistrials, and the extended deliberation period in this case, the Court of Appeal did not rule unreasonably when it found that the circumstances herein did not have a coercive impact on the jury.

Accordingly, this claim should be denied.

I. Trial Court Violated Fry's Sixth and Fourteenth Amendment Rights During Jury Deliberations by Editing Requested Testimony Read-backs in a Misleading Manner That Was Favorable to the Prosecution.

For the reasons set forth by the court with respect to claims 5 and 7, the court finds that petitioner has also waived this challenge to his conviction, having provided no briefing on this issue within his amended petition or traverse.[29] This abandoned claim must be denied.

VII. CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that the petition be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned

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[28] If this were a federal case, the trial judge's inquiry into the numerical division of the jury would have required reversal. Brasfield v. United States, 272 U.S. 448 (1926). Since Brasfield's per se rule rests on the supervisory power, it does not apply in federal habeas review. Lowenfield v. Phelps, 484 U.S. 231, 239-40 & n. 3 (1988); Locks v. Sumner, 703 F.2d 403, 406 (9th Cir.1983).

[29] None of petitioner's briefing on direct appeal to the state courts on this issue adequately implicated federal constitutional issues. Exh. A to Ans., pp. 81-88; Exh. C to Ans., pp. 15-17; Exh. E to Ans., pp. 13-19.

"Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: May 28 2004.

GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

GGH:009
fry1580.fr

FILED

AUG 27 2004

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN FRANCIS FRY,

Petitioner, No. CIV S-01-1580 FCD GGH P

vs.

CHERYL PLILER, Warden,

Respondent. ORDER

_____/

Petitioner, a state prisoner proceeding with counsel, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On June 2, 2004, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations. Respondent has filed a response to petitioner's objections.[1]

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[1]Respondent was granted an extension of time to file a response to the objections by order filed on July 8, 2004.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed June 2, 2004, are adopted in full; and

2. The petition is denied.

DATED: August 26, 2004

UNITED STATES DISTRICT JUDGE

/fry1580.805hc

*COPY*

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>JOHN FRANCIS FRY,<br>Defendant and Appellant. | A072396<br><br>(Solano County<br>Super. Ct. No. C34299) |

John Francis Fry was convicted of two counts of first degree murder and sentenced to life imprisonment without the possibility of parole. On appeal, he contends we must reverse his conviction because there was insufficient evidence to support the jury's verdicts; the trial court erred by ordering the jury to continue deliberations after nine jurors informed the trial court they did not believe further deliberations would be beneficial; the trial court erred in its editing of certain testimony read-backs requested by the jury; and the trial court erred in various of its rulings dealing with the admission of witness testimony and cross-examination. We affirm the judgment.

## I. FACTUAL AND PROCEDURAL HISTORY

Because the central issue on this appeal is the sufficiency of the evidence to support the murder conviction, we are required to review the extensive evidence in the lengthy trial record to determine whether the judgment was supported by substantial evidence. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 63; *People v. Johnson* (1980) 26 Cal.3d 557, 576-578)

## *THE CRIME*

Between 6:15 and 6:30 a.m. on October 27, 1992, the bodies of James and Cynthia Bell[1] were discovered in a white 1978 Camaro automobile parked on the dirt shoulder of Interstate 505 near the freeway intersection with VacaValley Parkway. Both victims had been shot. Cynthia's body was on the driver's side, with the window down. The victim's left arm was resting on the door sill, and her body was turned to the left as though she had been talking to someone outside the vehicle. According to witnesses who first saw the body, the upper portion of Cynthia's head was "missing." James's body was in the front passenger seat, slumped toward Cynthia's body. The car keys were in the ignition and turned to the "on" position. However, the engine was not running; the gas tank was empty, and the battery was dead. Black, sooty carbon deposits were visible directly below the tailpipe, indicating the car had been idling for some period of time at that location. There was an empty paper soft-drink cup from a Chevron minimart between James's thighs.

When police officers and paramedics arrived at the scene between 7:00 and 7:30 a.m., they found the bodies "ashen," "very cold, "very firm," and mottled or marbled in appearance. Pictures were taken of the victims' bodies and the crime scene between 8:30 and 10:00 a.m., before the bodies were moved or disturbed. By the time the coroners removed the victims from the car between 11:00 and 11:30 a.m., the bodies were totally rigid and stiff, and retained their postures when moved.

Three bullets were recovered: one from James' cheek; a second from the passenger door; and a third from the rear floor of the Camaro behind the passenger seat. Dr. Aaron Lipton, the pathologist who performed the autopsies on the victims, testified that Cynthia had sustained "massive damage" to the upper part of her face and skull,

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[1] At various points during the trial, Cynthia Bell was also referred to as "Cynthia Edon." For consistency, throughout this opinion we will refer to the female victim in this case as Cynthia Bell.

"with a large area of these areas of the face and skull absent . . . [a]nd a large portion of the brain material beneath the skull also absent." Dr. Lipton opined that the gunshot wound to Cynthia's head, which was the cause of her death, was the result of someone shooting her in the face from only inches away. Under the circumstances, the shooter "[p]ossibly" would be "covered with blood and tissue" from the victim. James had a total of eight bullet wounds on his head, chest, back and wrist; death resulted from the wounds to the head and lungs. Dr. Lipton opined that James' wounds were caused by shots fired at him from the driver's side of the car.

Based on the photographs of the victims taken after their bodies had been taken out of the Camaro, Dr. Lipton opined that they appeared to be "in full rigor mortis," a condition which, in a temperate climate like that present at the time and location of the crime, usually develops "between six and twelve hours" after death and then subsides within 36 hours. Rigor mortis would manifest by a "very firm" condition of the muscles directly under the skin. At the time he performed the autopsies, beginning at approximately 8:30 a.m. on October 28, 1992, Dr. Lipton noted only "mild" or "moderate" rigor mortis remaining in the victims' bodies. On cross-examination, Dr. Lipton testified that he originally estimated the victims had died three or four hours before the bodies were found, based on the pictures and the descriptions given by the police investigators. However, he also testified there are many different variables affecting the accuracy of any estimate of the time of death based on rigor mortis.

Several witnesses testified to having seen an older-model white Camaro, matching the description of the victim's car, parked at the crime scene between approximately 8:30 and 10:00 p.m. on October 26, 1992, in the same location and position where it was subsequently found with the victims' bodies the next morning. At least four different witnesses also described seeing an older-model pickup truck with a light-colored camper shell parked near the Camaro at some point during this time period.

Two other individuals testified that they encountered the victims and their white Camaro at a nearby convenience store sometime between 8:40 and 9:00 p.m. on the

evening of October 26, 1992. Both witnesses testified they saw James talking on a pay telephone, and heard Cynthia say something referring to "Leroy." Neither witness could tell whether Cynthia was talking to James about someone else named "Leroy," or addressing James by his own middle name of "Leroy." A third witness saw both victims sometime between 9:30 and 10:00 p.m. on October 26, 1992, at the Chevron minimart where she worked as a cashier. James purchased a soft drink at the time.

***PROSECUTION WITNESS TESTIMONY***

Several prosecution witnesses testified to appellant's erratic behavior during the weeks prior to the murders. Arleen Murphy had known appellant for 32 years, although she had lost touch with him for about 10 years until meeting him again in October 1992. On October 24, 1992, appellant drove Murphy to Davis in his blue truck with a white camper shell on it. As he "always" did, appellant had a gun in a case on the dashboard of his truck. He was also carrying a second gun in his belt. After driving Murphy out a back road and stopping in an isolated location on a levee, appellant told Murphy he was upset because he thought she was in league with their mutual acquaintance Ryan Bernal to steal $1,300 from him, and it was time for her "to go to sleep." Murphy tearfully tried to tell appellant she had no reason to steal from him. Saying he "had to show somebody up north that he had killed" her, appellant held his gun out of the window and fired two shots into the air. Appellant then told Murphy "he was going to get to the bottom of why . . . he was being told [Murphy] was going to steal" his money. Then appellant drove Murphy back to a gas station where Murphy's aunt, Lynn Ruiz, worked. Appellant again told Murphy "[s]ome people up north" were supposed to think she was dead, and to stay in hiding for a couple of days "so he could get to the bottom of this."

Murphy next saw appellant on the morning of October 26, 1992, when she unexpectedly found him sitting on a couch in the apartment of one of her friends where the front "door had been kicked in" and was off its hinges. Appellant told Murphy he had arranged a meeting at his house with her aunt Ruiz, "to get to the bottom of this and find out what was going on." Appellant drove Murphy in his truck back to his house. Murphy

then paged Ruiz, who arrived several hours later. At various points during the afternoon, Murphy saw a number of people at appellant's residence, including appellant's girlfriend Betty Jo Ringler; appellant's brother Edgar Fry; Shannon Nissen; Debbie Mathies; and Bernal. Murphy did not participate in the conversation between appellant and Ruiz. After talking with Ruiz, appellant assured Murphy everything "was going to be okay" between them. Around 5:30 p.m., shortly after Ruiz left, the two victims arrived and stayed awhile. Murphy could not recall seeing them leave. Later, appellant asked Murphy to purchase a gun for him from David Sparks, one of two other men who had arrived at the house, saying she "could get it cheaper" than he could. Murphy declined.

In order "to make sure everything was cleared up," Murphy asked appellant if she was "free to go." Appellant said, "Yes." Then he told her he was "going to go kill" Cynthia and James Bell because Cynthia had stolen from him and broken into his house. Appellant had thought Murphy knew the Bells, which had caused him to suspect Murphy of being involved in a plot against himself. Appellant wanted Murphy to go with him, but she refused. Appellant then left with Bernal, and Murphy left appellant's house shortly thereafter.

On cross-examination, Murphy testified that she did not immediately call the police to tell them about appellant's threat to kill the Bells because she "was really upset and stressed" and "didn't think he was serious." She did not tell the police about appellant's statement for at least a month because appellant had not yet been arrested and she "was really scared" of him.

Lynn Ruiz, Murphy's aunt, had been friends with victim Cynthia Bell for 15 years, and had known James Bell for about 5 years. On October 24, 1992, she saw Murphy and appellant at the gas station where she was working. Murphy appeared "nervous" and "antsy," like she was "in a hurry or bothered or something." At approximately 1:30 p.m. on October 26, 1992, Ruiz received a page from a telephone number she did not recognize. When Ruiz returned the call, appellant identified himself, stated he had asked Murphy to place the page for him, and said he wanted to talk with Ruiz about Cynthia.

Appellant gave Ruiz his address and asked her to stop by his home after she got off work. Ruiz agreed.

When Ruiz arrived at approximately 4:00 p.m., she found appellant outside his house by his "old," "bluish" pickup truck. Appellant told Ruiz he was "upset" with Cynthia because she owed him $600 to $800 for drugs and "[h]e thought she was trying to rip him off." Appellant described an incident in which Cynthia had entered his house without his permission and "was shocked" when she opened his bedroom door and found him there. He believed Cynthia was trying to steal methamphetamine from him, and he wanted to talk to Ruiz about it because both Cynthia and Murphy had mentioned her name and "respected [her] opinion." Ruiz agreed that Cynthia was probably trying to steal drugs from appellant, and told him to "[k]iss her off," "stay away from her," and "ignore her." Appellant told Ruiz he had been upset with Murphy because he thought she was involved in a conspiracy with Bernal and others "to rip him off also," and described the incident in which he had taken "her for a ride out to the country," "scared her and threatened her," and "took his gun and told her he was going to blow her away . . . if she didn't explain . . . ." He had pointed his gun at Murphy's head, and had then fired "a couple shots out the window to scare her or something." Appellant told Ruiz that Murphy and Bernal "had to prove their loyalty." He "wanted to blow everybody away," and had only refrained from killing Murphy because he had "known her for 20 years" since they "went to school together."

The next day, Ruiz heard about the discovery of the bodies by the freeway, and was worried it was Cynthia and James Bell. She drove to the victims' apartment to check on them. She found the apartment dark and a police officer present. She told the officer about her conversation the day before with appellant, in which appellant had been upset with the Bells because he thought they were trying to steal drugs from him, and "he wanted to blow everybody away." The following day Ruiz gave a taped interview to the police in which she stated that appellant had talked about taking his gun and blowing Cynthia's head off.

Lynn Reed was another long-time friend of Cynthia Bell and Murphy. She had purchased drugs from appellant as well as used them with him. In the early afternoon on October 25, 1992, appellant came to Reed's house looking for Murphy. Appellant was "[u]pset, angry, [and] frustrated" because, he said, Cynthia had stolen "[a] large amount of drugs . . . from his house." Appellant told Reed that Cynthia had come into his house by a sliding glass door when she thought he was not at home and had stolen drugs from him while he hid in his closet and watched her. Appellant came by Reed's residence again around 6:30 p.m. on October 26, 1992, driving his "baby blue" pickup truck with a camper shell on it, and accompanied by a "young man." Appellant wanted to purchase an ounce of methamphetamine for $900. He offered a gun for collateral when Reed replied that amount of drug would cost $1,100. When no agreement was reached, appellant left appearing "really anxious and frustrated."

Kathleen (Debbie) Mathies's testimony at an earlier trial was introduced through reading a transcript.[2] Mathies testified that she was alone with appellant in his house a "couple" of days before the murders when someone knocked on the door. Mathies could see through a window that it was Cynthia Bell, and she informed appellant of that fact. Appellant told Mathies not to answer the door. Mathies went upstairs to see appellant in his bedroom, and closed the bedroom door. Cynthia went around to the back of appellant's house and entered through a sliding glass patio door. She then came upstairs and opened appellant's bedroom door. Cynthia appeared "shocked" and "surprised" to find that someone was there, and said she just wanted "to see what was going on" at the

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[2] In connection with Mathies' testimony, the trial court told the jury: "Counsel and the Court have been going over a transcript of the prior testimony in September of 1994 of the witness Debbie Mathies. We had anticipated that Debbie Mathies would be here earlier this week, and then even as late as today, and counsel have agreed that we can read her testimony and make a finding that she's unavailable for trial because of her voluntary use of drugs and unable to testify. And the fact that she is unavailable is in no way connected to any acts or influence of the defendant, Mr. Fry. This lady is unavailable for the reasons of her own voluntary use of drugs."

house. After a few minutes, Cynthia left. Later, Mathies overheard appellant tell Ringler that he was going to kill Cynthia because "she did him wrong" over "[d]rugs and money." Mathies was also present at appellant's house on October 26, 1992, the day of the murders. At some point that day, she again heard appellant say he was going to kill Cynthia, and complain that Cynthia "owed him money for drugs, and they are lying and doing him wrong." Mathies had been using methamphetamine, marijuana and alcohol during the entire time period at issue.

In addition to Murphy, Ruiz, and Mathies, three other witnesses—Shannon Nissen, David Sparks and Edgar Fry—testified about appellant's actions in the days leading up to and including October 26, 1992, the date of the murder. A few days before the killings, appellant informed Nissen that Cynthia owed him $800 for drugs, and that Cynthia had told his girlfriend Ringler that appellant was sleeping with Cynthia. Appellant "wasn't happy" about this. Appellant's brother, Edgar Fry, testified that during the day on October 26, appellant told him that "a day or so before this time" Cynthia had come into his residence without permission, and he had caught her coming up stairs. Appellant appeared "[i]rritated"; he told Edgar he believed Cynthia had intended "[t]o steal his drugs." Appellant had a .357 revolver which he "usually" took with him whenever he left the house, carried in a soft tan-colored canvas case.

On October 26, 1992, Nissen was at appellant's residence with appellant, Bernal, Murphy, appellant's brother Edgar, and Ringler and her two girls. Victims Cynthia and James Bell were also present for some period of time during the day. In addition, Sparks and his friend Jason Gibeau arrived at some point in the evening in a dark minitruck. Sparks was carrying a .38-caliber pistol and approximately $1,000 in cash, because he was interested in purchasing an ounce of methamphetamine. There was some discussion between Sparks and appellant about the latter purchasing Spark's gun, but no sale of the gun took place. There was also some discussion of purchasing drugs at appellant's house, but Sparks declined because he already had a deal set up elsewhere. After about 30 minutes, Gibeau and Sparks left in Gibeau's truck. Bernal asked appellant if they were

meeting at "505." Appellant replied, "That will work." Shortly thereafter, between 7:00 and 7:30 p.m., appellant retrieved his gun, and he and Bernal left in appellant's truck after telling Edgar he "was going to go make a drug deal, do some business." At some point thereafter, Cynthia and James Bell also left appellant's house.[3] Edgar testified that Cynthia told him she was going to meet appellant near the "Wild Oates" store. The victims left in their automobile, a light-colored 1970's Camaro.

Sparks testified that after he and Gibeau left in the latter's truck and were on the Interstate 80 freeway to Vacaville, a vehicle pulled up very rapidly behind them. As it came "[a]s close as you could get without touching," Sparks recognized appellant's truck. Both vehicles pulled over to the side of the road, and Sparks got out of Gibeau's truck to talk with appellant. Appellant apologized to Sparks that "things . . . didn't work out at the house," and expressed interest in selling him some methamphetamine. Sparks agreed to ride in appellant's truck and talk with him on condition that appellant would drive him to Vacaville. Bernal got out of appellant's truck and left with Gibeau in the latter's truck.

When Sparks got into appellant's truck, he saw a soft gun carrying case on the seat or the dashboard. Appellant proceeded to drive Sparks around for about 45 minutes, persistently trying to convince Sparks to "put some money up" and "go in" with him on purchasing a larger quantity of drugs, stopping at various locations to talk with different individuals about buying drugs or selling Sparks' gun, and ignoring Sparks' repeated requests to drive him to Vacaville. Sparks began to feel "really uncomfortable." Finally,

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[3] Like much of the testimony in this case, there was some conflict in the witnesses' recollection of when the victims arrived at appellant's house on October 26, 1992, and when they left. As seen, Murphy testified the Bells arrived at approximately 5:30 p.m. shortly after Ruiz's departure, and she did not see them leave. Nissen testified that Cynthia and James Bell were present at appellant's house during the afternoon, and that they left about half an hour after appellant left with Bernal. On the other hand, Edgar Fry testified that the Bells were not at appellant's residence when he arrived there at approximately 5:00 p.m., and did not show up until 30 to 45 minutes *after* appellant left

when appellant stopped at a gas station and walked in, Sparks got out of appellant's truck, approached a motorist, and obtained a ride to Vacaville.

Both Nissen and Edgar Fry testified that Bernal returned to appellant's house sometime later in the evening, stayed for a few minutes, and then left again. Hours later that night appellant returned, driving his light blue pickup truck with the camper shell on it. Nissen, Edgar, Mathies, and Ringler were all at appellant's house when he returned. Edgar, who was not wearing a watch, estimated that it was approximately 10;30 p.m. when appellant returned.

Nissen, Edgar and Mathies each gave somewhat differing accounts of appellant's actions and appearance upon his return home. Nissen testified that appellant was wearing a T-shirt, blue jeans and tennis shoes, and was carrying his gun case. According to Nissen, there were spots of blood on appellant's shirt, his shoes, his forehead, the gun case, and "maybe his pants." Appellant appeared "tired" and "kind of nervous"; he went to the kitchen, wiped his face and forehead with a towel, and then walked up to his bedroom. Edgar testified that appellant was wearing "[p]ants with no shirt," and carrying a "satchel or briefcase." He immediately went "straight upstairs" and into the bathroom off the master bedroom, from which Edgar heard running water. In response to Edgar's question, appellant said he had taken his shirt off because there was blood on it. Edgar saw a large spot of blood on appellant's pants. Mathies saw appellant drive up and then sit in his truck for a while before coming in the house and going upstairs to the bathroom. where he washed blood off his hands. Mathies could not remember whether appellant was wearing a shirt.

Nissen, Mathies, Edgar and Ringler all followed appellant upstairs to his bedroom. Mathies testified that after coming out of the bathroom, appellant said that he had "killed her," and "had to do James, too." He reported that "[h]e blew their heads off with a gun,"

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with Bernal. According to Edgar, the victims stayed for another 30 to 45 minutes and then left.

and that Cynthia's head "looked like spaghetti." He had shot James Bell "a couple of times in the back" after missing with his first shot. According to Nissen, appellant "kind of smiled" and asked him if he "had ever seen what a .357 does to someone's head at close range." When Nissen shook his head "[n]o," appellant said "It's not pretty." Referring to Cynthia Bell, appellant stated "we wouldn't have to worry about her anymore." When appellant announced that the Bells "were taken care of," Edgar asked him if he "had done" Cynthia. Appellant said, "Yes." According to Edgar, appellant said he told Cynthia "she shouldn't have fucked with him," and told James "he was sorry" before shooting him. Like Nissen, Edgar also testified that appellant commented that "you couldn't imagine what a .357 would do . . . [t]o somebody's skull." Appellant pulled a nickel-plated .357 gun out of the gun case and unloaded it. The gun contained four spent shells and two live shells, which both Edgar and Nissen described as .357 "wadcutters." Appellant asked Nissen if he wanted to clean the gun. When Nissen declined, appellant handed the gun to Edgar, who cleaned it for him. Both Nissen and Edgar testified they saw what appeared to be blood on the gun. In addition, Mathies saw blood on appellant's wrist watch, which appellant also asked Edgar to clean off.

Both Mathies and Edgar Fry testified that appellant and Edgar discussed what to do with appellant's bloody clothes. Edgar told appellant that if he "did do it," then "he better get rid of his clothes." Edgar volunteered to take them with him when he left. At first appellant resisted the idea, because he had few pairs of pants and the ones he was wearing "were good pants." Eventually appellant gave Edgar a paper bag, which Edgar assumed contained appellant's clothing. He disposed of it in a dumpster. He knew that he could get in trouble for destroying evidence, but did it because he wanted to help his brother. Appellant left the house again around 11:30 p.m., saying he was going to the Chevron station to "make a transaction." Appellant returned about 20 minutes later. Edgar left appellant's house between 1:00 and 2:00 a.m. that morning.

Nissen spent the night at appellant's house. The next morning, appellant asked him to help take the camper shell off appellant's pickup truck. Appellant was in a hurry;

he told Nissen he "didn't want people to recognize the truck." While they were working on the truck, appellant told Nissen "that he shot [Cynthia Bell] and her boyfriend." Appellant described shooting Cynthia once in the head from the driver's side of the car, after which James Bell had turned toward appellant, put his hands in the air, and said "What the fuck are you doing." Appellant then demonstrated how he had shot James three times, " 'pop, pop, pop.' " Nissen did not report appellant's confession when the police questioned him about the murders on October 28 as they served a search warrant on appellant's residence, because appellant was his friend, and he "didn't want him to get in trouble." In addition, Ringler and appellant both told Nissen that, if asked, he should say appellant was home at the time of the murders. A "couple days" later the police returned to the house to talk with Nissen, and threatened to arrest him for possession and use of methamphetamine. At that point, Nissen decided to tell the police what he knew in order to avoid arrest. On cross-examination, Nissen admitted reading press accounts of the killings before he spoke to the police. However, he testified he never felt threatened by the police to tell anything but the truth, and that he did tell the truth.

Like Nissen, Mathies did not contact the police despite her knowledge of appellant's involvement in the murders. She testified she did not contact the police and initially denied knowing anything because she "was scared." She denied changing her story because the police had threatened to arrest her and take her children away. When she first heard appellant threaten to kill Cynthia Bell, Mathies did not believe it, and simply thought it was "an expression." On cross-examination, Mathies testified that Nissen was not in the bedroom when appellant was cleaning up after the killings.

Edgar Fry testified that during a conversation with appellant after the police first searched appellant's residence and seized his clothing, appellant told Edgar that he had thrown the .357 into the bushes at the Chevron station after he drove by his house and saw police activity there. Appellant said someone named "Mike" picked up the gun for him. A few days after the killing, while they were working on a car together, appellant told Edgar that he had the power "[t]o give or take life." Appellant told Edgar to "[j]ust

keep [his] mouth shut" if contacted by the police. Edgar intended to do so, until contacted by the police and offered immunity for telling what he knew. The police never asked him to say anything but the truth, and never threatened him other than to tell him what he "was up against."

During the search of appellant's home on October 28, 1992, police found a gun box labeled " 'Ruger, Security-six, .357 Magnum Cal. stainless steel.' " The police also found a metal box containing 12 bullets on a bookcase in appellant's bedroom, a loaded Winchester .22-caliber rifle in the living room closet, a "pipe bomb," and a loaded .22-caliber revolver under the seat of a red Chevrolet pickup truck parked at appellant's residence. The police were not able to find any other gun on the premises. There was a white camper shell in appellant's backyard. There were two small .3 gram packages of methamphetamine on the premises, as well as marijuana and drug paraphernalia. Appellant arrived on the premises while the officers were serving the warrant. There was a loaded .22-caliber pistol in his jacket pocket and five additional rounds of .22-caliber ammunition. The police also found a 12-gauge shotgun and a .22-caliber rifle in the blue pickup truck appellant was driving upon his arrival. The white camper shell was subsequently found to fit the blue pickup truck. Appellant was arrested for gun possession and then released.

Police records showed that appellant had registered a Ruger Security Six .357-magnum pistol on May 22, 1991. The gun was light silver in color, with a "brushed," "satin finish" and black rubber grips. An analysis of three of the bullets found at the crime scene showed that two were "semi-wadcutter" style, and one was a "round-nosed" style bullet. All three were fired from a gun with lands and grooves matching those of either a .38-special or a .357-magnum.

On November 10, 1992, Dixon police received a request to "be on the lookout" for appellant in connection with the murders. Police officers observed appellant the next morning and followed him into a gas station. When asked to stay in his vehicle and keep his hands where the police could see them, appellant accelerated his vehicle and quickly

drove out of the gas station. The police activated lights and siren and attempted to execute a traffic stop, but appellant drove on through a stop sign and entered the freeway. Appellant accelerated to a speed of about 90 miles an hour before police were able to force him to stop. Appellant was taken into custody.

The prosecution offered the testimony of Robert Jacobitz, a jailhouse informant. Jacobitz testified that while they were incarcerated in the same facility, appellant asked his advice on joining a prison gang called the Aryan Brotherhood. Jacobitz told appellant that one had to "make your bones" by killing someone before being allowed to join. While together in the law library, appellant told Jacobitz about his case, and said his brother was "the star witness in the case against him." The more appellant talked about his brother, the angrier and more vehement he became, stating: " 'My brother has cost me 2-1/2 years of my life, and now he's trying to cost me my whole life. '" Jacobitz told appellant he should have his brother "whacked, taken care of," i.e., killed. Appellant replied that this would not help because the prosecutor could simply use his brother's testimony from the two previous trials; "[w]hat he needed was his brother to change his testimony to offset other witnesses." Jacobitz told appellant he could arrange to have people call on his brother to coerce him to change his story, possibly by cutting off his finger. Appellant repeatedly stated his intention to kill his brother after he had "let some time pass."

Jacobitz testified that appellant discussed the facts of his case with him in detail. Appellant said he had been "doing a lot of crazy things" during the time just before the murders, "going around kicking people's doors in" and "putting guns to their heads." Because Cynthia Bell owed him money and he had caught her breaking into his house, appellant arranged to meet her in a secluded "undeveloped" area of Vacaville with the intent to kill her. When appellant arrived, the Bells were already there. Appellant told Jacobitz that he walked up to the Bell's car, leaned down and kissed Cynthia on the cheek while she sat in the driver's seat, said something to her, and then "blew her head off" by shooting her once with his .357 handgun. Appellant then reached across her, and said:

" 'I'm sorry, James. You're in the wrong place at the wrong time.' " He then shot James three times. Appellant told Jacobitz that a piece of Cynthia's skull was found 35 feet away, and that he had blood on his shirt, pants and shoes. Appellant told Jacobitz the killings were "almost like a sexual rush." When he returned to his house he was "pumped up" and splattered with blood, and made incriminating statements to his brother and other witnesses. Among other things, appellant told Jacobitz he had said " 'You should have seen what a .357 does to a girl's head.' " Appellant told Jacobitz his brother had disposed of his bloody clothes in a trash can, and that his girlfriend's "best friend," a "black male," had the murder weapon in his possession.

Jacobitz and appellant discussed the various witnesses testifying against him and what could be done with respect to each of them. Appellant reportedly thought Nissen could not "be tampered with" because he was currently living out of state. Appellant thought that because of her heroin addiction, Mathies might be vulnerable to a "hot shot," or mortal overdose. Appellant also told Jacobitz that an out-of-state truck driver claimed to be an eyewitness to the murders and was testifying that appellant was not the murderer. Appellant and Jacobitz "were both laughing" about the truck driver's testimony. Appellant gave Jacobitz the names of his brother, his brother's wife, and the fact they had three children. Jacobitz took notes and wrote down the names. Later, appellant himself wrote down Edgar's name and address on a piece of paper and gave it to Jacobitz. The piece of paper was admitted in evidence at trial.

Jacobitz testified that he decided to contact the authorities and become an informant after appellant told him he would be willing to harm his brother's children. Jacobitz had recently become a father for the first time, and "felt that was wrong." Jacobitz sent the district attorney an eight-page letter detailing what appellant had said,

without asking for any compensation or reward.[4] In return for additional cooperation, Jacobitz subsequently received diversion to a counseling program for a pending domestic abuse charge, and the district attorney agreed to recommend that Jacobitz's parole not be revoked. As a result, Jacobitz testified, he had "been branded a snitch," which "could be a death sentence in prison." During the period prior to trial Jacobitz had been isolated from the rest of the jail population for his own protection. On cross-examination, Jacobitz admitted convictions for robbery and larceny, and acknowledged that he had had access to one of appellant's newspaper clippings on this case.

During the course of renovations to a commercial building at 5141 Quinn Road in Vacaville in May 1993, appellant's gun, a .357 Ruger, was discovered in the metal "channel" of a door frame, inside its tan canvas case. The gun was not loaded, but a speed loader found with the gun contained six bullets. Of the bullets, two were .38's and four were .357's. According to the individual who found the gun, the bullets were "blunt" or "flat" on top. The building where the gun was found was approximately one mile from the location of the murders. The gun was confirmed to be the weapon appellant had previously registered with the Vacaville police. Edgar Fry testified that the gun found in the building on Quinn Road was the same gun he cleaned off on the night of the killings. He also testified that the canvas gun case "looks familiar" and "very well could be" appellant's. An expert criminalist testified that one of the bullets recovered from the victims had definitely been fired from appellant's gun. Two other bullets found at the crime scene "could have been fired from" that gun as well, although there were too few markings on the slugs to be certain they had come from appellant's gun.

Michael Walker testified that in late 1992 he rented space at 5141 Quinn Road for a general repair shop. For the last three months of the year, Walker shared the space with

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[4] According to Jacobitz: "When he told me he had no problem if . . . the . . . last alternative is using the kids to get his freedom, I know that John Fry is out of control and needs to be stopped."

one "Mike Turner." In exchange for his oral promise to pay half the rent, Turner had his own key to the rental unit, "stored some stuff" there, and came and went as he pleased. Near the end of December 1992, Turner "stopped coming around" because of a dispute with Walker over money Walker knew appellant from when they both drove trucks for the same company. About one month before the murders, appellant and Ringler "stopped by" Walker's shop on Quinn Road when he was there. Michael Turner was seen standing across the street from appellant's house at the time the police served the search warrant on October 28, 1992. After the police spoke with Turner briefly, he walked away from the area.

Douglas Carter, a dispatcher at the trucking company for which both Walker and appellant had worked, testified that he helped Walker move his possessions out of the Quinn Road unit in March 1993. One or two days before appellant's arrest, Carter saw appellant outside the offices of the trucking company. Knowing that the police were looking for appellant, Carter asked him "if he killed the kid out there in Yolo County," referring to a recent shooting death. Appellant said, "No," but added that "he killed the people in Vacaville." Appellant told Carter that the people he killed had been "harassing him and his kids," and that "he just went to his pickup, got his gun and killed them." When Carter asked him " '. . . What were you thinking,' " appellant replied, " 'I just messed up.' " When Carter told appellant "he should turn himself in," appellant said, " 'No,' . . . 'they won't catch me.' " Carter did not go to the police with this information because he did not want to get involved. He also did not know whether to believe appellant's confession, "because sometimes he seemed kind of full of hot air."

### *DEFENSE WITNESS TESTIMONY*

In his defense, appellant offered evidence and testimony to show that (a) he was not present at the scene of the crime when it occurred; (b) the prosecution's witnesses were not credible; and (c) at least three other people (Daryl Borelli, Ryan Bernal, and Anthony Hurtz) were linked to the murders, and had means, motive, and opportunity to commit them.

Appellant's girlfriend Ringler and her daughter Cynthia C. gave testimony on the identities of the persons coming, going and staying at appellant's residence on October 26, 1992. Cynthia C. confirmed the testimony of Nissen and Edgar Fry that appellant left the house at approximately 7:00 p.m., shortly after Sparks and Gibeau left; and that Cynthia and James Bell were in the house for at least 20 to 30 minutes between 7:30 and 8:00 p.m. before leaving. Cynthia C. also confirmed that appellant generally carried his handgun on the dashboard of his truck. Ringler similarly testified that appellant "always had his gun with him," and he "always" took the gun with him when he got out of his truck. However, on the day after the murders, when appellant drove Ringler to work in his pickup truck, Ringler could not recall whether he brought his gun with him.

At trial, Cynthia C. claimed she could place appellant's return to the house at precisely 10:01 p.m., because she turned around and looked at the clock when he came in the door. According to Cynthia C., there was nothing unusual about appellant's appearance; he was carrying a black briefcase, wearing jeans and a T-shirt, and appeared "casual." She did not see any blood on him. On the other hand, she admitted originally telling the police she could only estimate the time of appellant's return home as between 9:30 and 10:15 p.m. because she did not look at the clock. Cynthia C. also claimed that Bernal came to the house at 11:00 p.m., about one hour *after* appellant returned; appellant never left the house again that night; and she would have seen appellant leave because he would have walked by where she was watching television.

Ringler testified that on October 23, 1992, she and appellant agreed that Ringler should "take over" appellant's drug business and collect his debts because appellant "wasn't doing very well." After that, "everybody had to deal with" her. According to Ringler, she and Cynthia Bell were "[v]ery good friends"; although she had a serious "fight" with Cynthia on October 24, 1992, they resolved it the next day. Ringler testified that she did not know about the incident in which Cynthia had "broken into" appellant's residence until Cynthia herself told her about it. Ringler did not know what Cynthia owed appellant, although she knew Cynthia owed money for a "sixteenth" of

methamphetamine Ringler had "front[ed]" her. Ringler testified that appellant never gave Cynthia a hard time about the money Cynthia owed him, and she never heard appellant ever say he wanted to harm or kill Cynthia or James Bell. However, Ringler conceded that appellant was angry with Cynthia because of her attempt to break into his residence, with what he believed was an intent to steal drugs; indeed, as a result of that incident, Cynthia and appellant were not speaking to each other and appeared to be trying to avoid each other.

Ringler testified that appellant came home between 10:00 and 10:30 p.m. on October 26, 1992, wearing a T-shirt and pair of jeans. Appellant was "tweaking" on methamphetamine, but otherwise appeared "basically normal for him at that point in time." Ringler did not see any blood on appellant's shirt or pants, or anything in his hands. After a while, appellant went to the Chevron station, and then returned after about 15 minutes. He went straight upstairs without washing himself. Ringler denied hearing appellant talk about harming Cynthia or James Bell that night, hearing any discussion of what to do with appellant's clothing, or seeing any blood being cleaned off appellant's body, gun or watch. Ringler acknowledged that she knew Michael Turner; Turner was "a good friend" of hers; he was present at the house on the night of the search warrant; she introduced Turner to appellant; and she saw Turner alone at the "shop" on Quinn Road where the gun was later discovered. However, Ringler denied ever asking Turner to do anything with appellant's gun. Ringler admitted that she continued to have a relationship with appellant at the time of trial, and that she lied to the police to protect him when initially questioned about his whereabouts on the night of the murders.

Manuel Michel, another "good friend" of appellant, testified that he saw appellant at a liquor store between 6:00 and 7:00 p.m. on October 26, 1992. Later, he went by appellant's house. According to Michel, he was already at appellant's residence when appellant returned that evening, and "was the first one [appellant] saw when he opened the door." He and appellant went upstairs, where they consumed methamphetamine. Michel denied that appellant had any blood on him at the time.

Pete Joy testified that he met appellant at a Chevron station sometime between 10:00 and 10:30 p.m. on October 26, 1992, to buy some methamphetamine. They left around 11:00 p.m. Shannon Joy testified that appellant looked "jumpy and a little shaky." She and her husband sent appellant $80 after his house had been searched, and let him stay in their mobile home.

Ronald Lewis, who had known appellant for about five years as of the time of trial, testified that he saw appellant and Mathies the day after Lewis heard about the murders. Lewis testified that Mathies had a "very bad" reputation for truthfulness.

Charles Morton, a criminalist expert in firearms, testified that there were insufficient markings on the bullets found at the crime scene to match them to appellant's gun. Although he conceded there was "significant agreement" between test bullets fired from appellant's gun and the bullets that killed the victims, he opined the agreement was not "sufficient" to make an identification.

### *APPELLANT'S TESTIMONY*

Appellant testified in his own defense. In October 1992, he owned a 1977 "[p]owder blue" Ford pickup truck with a white camper shell. At the time he also owned five guns, including a Ruger .357-magnum. Appellant denied killing either Cynthia or James Bell, threatening to do so, or talking with anyone about having done so.

Appellant testified that he began selling drugs to support his own methamphetamine habit after he was fired from his truck driving job in September 1992. He was not very successful at it, and was "slowly losing ground." Appellant met Cynthia Bell because she was a friend of his girlfriend, Ringler. He would "front" one-sixteenth of an ounce of methamphetamine to Cynthia, who would in turn "cut" the drug, divide it into smaller parcels, and then pay him back after selling it herself. Although Cynthia was in debt to appellant for as much as $700, appellant claimed she would always pay him back. Just before she was murdered, Cynthia owed him between $150 and $170. Appellant claimed that he never threatened Cynthia about the money she owed him.

Appellant described the incident on October 23, 1992, in which Cynthia Bell "entered my house without asking, or broke into the house, however you want to say it." He claimed that he did not get angry at Cynthia; instead, he was "more amused" by the incident. After Cynthia found him in his bedroom, he "fronted" her a quantity of methamphetamine, injected her with some of the drug, and then socialized with her and James Bell. He claimed that after that, everything "was fine" between them.

Appellant had known Murphy from going to school with her between 1966 and 1979. He started selling drugs to her in October 1992. Murphy introduced appellant to Bernal about one week before October 26. Through Bernal, appellant also became reacquainted with Daryl Borelli, whom appellant had known in high school. Bernal served as a conduit for drug purchases by appellant from Borelli. On October 25, Borelli brought two ounces of methamphetamine to appellant's house. They had never dealt personally with each other before. Later that night, Borelli came over to appellant's house again. They talked in appellant's bedroom about the "games" Bernal was playing, and decided that from then on Bernal would not serve as a "middleman" for them. According to appellant, Borelli told him that as long as he had Murphy and Cynthia in his business, he "was going to have problems," and Cynthia "shouldn't even be able to breathe the air that we do." Appellant denied saying anything negative about Cynthia to Borelli or twirling a gun around in his presence.

Appellant acknowledged driving Murphy out into the country on October 24, 1992. He claimed he was merely taking the "rural route" to Davis. According to appellant, Murphy was "hysterical," so he simply let her talk for a while. Then he began to question her about a tape recording he had heard of a suspicious conversation between Murphy and Bernal. Appellant denied threatening to kill Murphy at any time or pointing a gun at her. According to appellant, he simply "decided to play a little game," and shot his gun out of the truck window twice. Appellant next saw Murphy on the morning of October 26, when, according to him, she called to ask him to pick her up at a friend's apartment in Davis. When he arrived, he became irritated because no one was there. He

kicked the door, and it "flew open." He then went in and sat on a couch, thinking "somebody would show up sooner or later." When Murphy arrived, appellant left a note apologizing for the damage to the door.

Appellant asked Murphy to contact Ruiz because he wanted to ask her advice about how to get along with heavy methamphetamine users. He denied making any threats against the Bells or anyone else while talking with Ruiz. He "could have said something" to the effect that he felt "like just blowing them away," but he was only "laughing and joking," and not directing the comment "toward any one person." Appellant decided he "didn't want to deal in drugs anymore," because he "didn't want to put up with the games that were being played," and was planning on "cutting everybody loose," including Cynthia. He did not want to talk to Cynthia or have anything to do with her, although she would continue to be welcome in his house because of her friendship with Ringler. Appellant denied making any arrangements with Cynthia to meet her at the intersection of Interstate 505 and VacaValley, or anywhere else that day.

Sparks arrived at appellant's house with "another kid" whom appellant did not know between 5:30 and 6:00 p.m. on October 26, 1992, and tried to sell appellant a .38 special. Appellant did not buy it because it was damaged. According to appellant, Sparks said he had some money and was looking for an ounce of methamphetamine. Because he did not want to deal in his house, appellant told Sparks to wait in a nearby park while appellant tried to find some drugs. Appellant and Bernal left in appellant's pickup truck at the same time Sparks left. When Sparks proceeded onto the freeway instead of toward the park, appellant followed close behind and blinked his headlights. They pulled over, and agreed that Sparks would come with appellant to look for methamphetamine while Bernal went with Gibeau and then met them at a gas station in an hour. Once appellant found some methamphetamine, however, Sparks was no longer interested in buying it and instead asked appellant to take him to Vacaville. Appellant declined, saying he would take Sparks to the agreed rendezvous. According to appellant, Sparks "was so spun, he couldn't talk." After driving around for awhile looking for someone to purchase Sparks'

gun, appellant stopped at the gas station and got out to telephone Ringler, leaving his own .357 gun on or under the seat. When appellant returned to the truck, Sparks was gone. Appellant did not see Sparks leave; he assumed Bernal had picked him up. Appellant did not check to see if his gun was still in the truck.

Appellant testified that after Sparks left, Bernal and Gibeau arrived and talked with him for about 20 minutes before leaving. John Peterskoff and Manuel Michel, two of appellant's former trucking acquaintances, also pulled up at the gas station. After drinking beers and socializing with them for at least an hour, appellant telephoned Ringler at approximately 7:00 p.m. Thereafter, he "shot up," and drove home "very slowly." When he got home, he "pulled into the driveway and sat there for a while," "trying to maintain control" and "get a focus." After Mathies, Nissen and Ringler asked him if he "was going to come inside or just sit out there all night," he came inside with his briefcase and his shirt on. Because appellant "was pretty spun" on drugs at that point he "didn't even think about" his gun, even though it was his normal custom always to retrieve his gun from the truck and bring it into the house with him in the briefcase or some other holder. Appellant went upstairs, put down his briefcase, and went into the bathroom. He denied changing his clothes or having any blood on him. A few minutes later, someone came to the bedroom and informed appellant that Michel was there to see him. Michel stayed for about an hour talking with appellant and taking drugs. Between 10:00 and 10:30 p.m., in response to two telephone calls, appellant went to the nearby Chevron station to supply Pete and Shannon Joy with methamphetamine. After about 20 minutes, appellant came home and went to sleep.

The next morning, appellant asked Nissen to help him take the camper shell off of his pickup truck because he wanted to save gas mileage. He denied telling Nissen he did not want anyone to recognize the truck, or saying anything to Nissen about the victims. Appellant claimed to have asked Nissen to take his gun from his briefcase, and to put it behind the seat of the truck. According to appellant, his "last clear recollection" of the gun was seeing in on the seat of his truck while he was talking with Sparks. He assumed

the gun was in his briefcase because it was his usual habit to put it in the briefcase when he got out of the truck and went into the house. Appellant conceded that his usual custom was to have a trigger lock on the gun, and that it would have to be removed for the gun to be used.[5] Appellant also admitted he lied to the police when asked when he had last seen his .357. Appellant denied asking Turner to get rid of his gun.[6]

Appellant denied telling Carter that he killed the Bells. According to appellant, Carter asked him whether he killed someone in Yolo County and whether he "did the two in Vacaville." After "playing with [Carter's] mind" and "having fun" with him a bit, appellant told him "No, but they sure think I did." Appellant claimed he fled from the police when they tried to arrest him because he "had no intentions on going to prison for three counts of murder that I didn't do."

Appellant denied confessing to Jacobitz or giving him any information about the Bells' murder. According to appellant, Jacobitz was a known "liar"; appellant was suspicious of him because he asked too many questions about appellant's case and wanted to read all of appellant's newspaper clippings. Appellant let Jacobitz read some newspaper clippings, which Jacobitz kept for several days. However, appellant would not let Jacobitz read the police report because he mistrusted him. Appellant thought Jacobitz may have heard him talk with other inmates about how witnesses had testified at his earlier trials. Appellant testified that while in the county jail law library, Jacobitz offered to help him by having Edgar killed. Appellant rejected the offer, saying he just wanted Edgar "to tell the truth," i.e., that Edgar "had been threatened" by the police to give testimony against appellant. On cross-examination, appellant admitted that he gave

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[5] On October 28, 1992, the police found a trigger lock in a gym bag on the passenger floorboard of appellant's pickup truck.

[6] Appellant testified he did not know Turner, and was introduced to him the first time when Turner came with Ringler to pick him up at the police station. According to appellant, he did not ask Turner to "get rid" of his gun because "I didn't even know Mike Turner. I wouldn't ask somebody I didn't know to do something like that."

Edgar's address to Jacobitz. According to appellant, he "didn't think [there] was any harm" in doing so even though Jacobitz claimed to be a member of the Aryan Brotherhood and had offered to have Edgar "done in," because Jacobitz was "a liar."[7]

***TIME OF DEATH EVIDENCE***

Appellant offered markedly conflicting testimony from several witnesses in an attempt to establish that the murders could not have occurred during the time frame established by the prosecution witnesses. Russell Carter, a truck driver from Missouri, testified that when he drove by the scene of the murders between 6:10 and 6:45 a.m. on October 27, he saw several people and at least *five* vehicles: an old two-tone brown Ford van, a dark brown 1975-1977 Oldsmobile Cutlass, a beat-up old Volkswagen, a 1981-1982 silver Cadillac, and a Camaro. Carter saw a woman in the driver's seat of the Camaro; an approximately 40-year-old man with a light blue T-shirt standing next to the Ford van; a gray-haired man in the driver's seat of the Cadillac with a woman with long gray hair in the passenger seat; another person in the Oldsmobile; and yet another man walking toward the Camaro with a small pistol in his hand. This man had light brown shoulder-length hair, was five feet seven to eight inches in height and about one hundred

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[7] In support of his testimony in this regard, appellant offered the testimony of two other county jail inmates (James Stevenson and Brett Swafford) that Jacobitz was in the vicinity when appellant talked about what had happened at his previous trials. According to these inmates, appellant only talked about what the witnesses said, and did not discuss what he himself actually did or did not do. The inmates testified that Jacobitz read the Vacaville newspaper, and was interested in newspaper clippings about appellant's case which he obtained either from appellant directly or through one of the inmates to whom appellant had loaned them. Swafford testified that appellant expressed concern about Jacobitz, saying he did not trust him, and volunteered that he was "going to have some fun with the guy." Swafford was impeached with prior felony convictions, and admitted that appellant was a "good acquaintance" of his in the jail.

In addition, Charles Millard testified that he visited appellant in county jail as a favor to appellant's mother. According to Millard, about one week before trial appellant told Millard he was concerned that Jacobitz was a "snitch" because he persisted in asking about appellant's trial.

forty pounds in weight, and was wearing a T-shirt, jeans and a baseball cap. When he reached the Camaro, the man shot the woman in the head, causing blood to splatter all over the windshield. Meanwhile, the man standing next to the van was talking into a portable scanner or telephone. Carter called 911 on his CB radio, drove to the business to which he was making a delivery, and called 911 a second time. Although Carter had never seen appellant before, he was sure appellant was not the man he saw shoot the woman because the shooter had a full head of hair. On cross-examination, Carter conceded he was some "distance" away from the scene; because he had "to watch the road" as he drove his tractor-trailer by, he could not "see all of it."

Still other defense witnesses gave contradictory and inconsistent evidence about what they saw and the times that they saw it as they drove by the scene of the murders. Charles Anderson testified that when he drove by the murder scene at approximately 8:15 p.m. on October 26, 1992, he saw an older Camaro or Firebird together with a light green mid-70's Ford pickup with a lumber rack and no camper shell. Robert Tavares testified he saw a white Camaro and a blue 1970's Chevrolet pickup parked side by side approximately one hour later. According to Tavares, a "very skinny," 6-foot-tall 20 or 30-year-old white male with dirty blond shoulder-length hair got out of the passenger side of the car. Tavares did not see anyone else around, and could not tell if the windows of the Camaro were open. In direct contradiction to Tavares's testimony, Scott Schriefer testified that he did not see *any* vehicles in the area when he drove by the murder scene at approximately 9:15 p.m. Lisa Peer saw an older white Camaro and a newer red Camaro racing up Interstate 505 sometime during the night of October 26. At approximately 12:08 a.m., Peer saw the same two cars parked at the scene of the murders. A very petite, 5-foot-4-inch woman with short brown hair was apparently arguing with a man about five feet eight to nine inches with "new-fangled" spiky hair, who towered over her. When Linda Daraskavich drove by the same scene about 3:05 a.m., she saw the Camaro and an older model, dark-colored pickup truck. A tall, thin man, six feet to six-foot three inches

in height and wearing a dark-colored baseball cap, was walking from the car to the truck. Daraskavich could not tell if the windows of the Camaro were rolled up or down.

### *THIRD PARTY CULPABILITY EVIDENCE*

Through the testimony of several witnesses, appellant tried to establish that one or more of several other individuals was the actual perpetrator of the murders in this case. The defense theory was that these persons were acting on behalf of Daryl Borelli, another local methamphetamine dealer to whom Cynthia Bell owed money.

#### *BORELLI*

Called as a hostile witness by the defense, Borelli himself testified that he and appellant had been acquainted from school, but were never friends. Borelli was employed as a custodian at the University of California in Davis; he denied selling drugs in 1992 or that Bernal worked for him as a middleman, and claimed that no one owed him any money in 1992. Borelli had known Michael Walker, the man who rented the space where appellant's gun was found, for eight years. Borelli denied having anything to do either with the Bells' murder, or with the disappearance of appellant's gun.

According to Borelli, the first contact he had with appellant since grade school occurred when appellant called his house in October 1992, told Borelli's wife that Bernal and Murphy were trying to "rip him off," and asked Borelli to come over to appellant's house immediately if he wanted to see Bernal alive again. Borelli went to appellant's house and met with appellant and Bernal in appellant's bedroom. Appellant was heavily under the influence of drugs; he accused Cynthia Bell of trying to steal his drugs and owing him $600, and talked about blowing her head off. While doing so, appellant was twirling a cocked .357-magnum around his finger and playing a tape of a telephone conversation between Bernal and Murphy. Borelli acknowledged that he did not immediately tell the police about appellant's threats against Cynthia Bell, explaining that he did not want to get involved. He told the entire story only after he heard that appellant was accusing him of the murders.

Debra Lyn Neundorf testified via transcript from a previous trial. She had been friends with Cynthia Bell for 15 years and had dated Borelli for 2 years, although not in October 1992. Neundorf testified that Borelli never told her he was present when the Bells were shot, and she never heard him agree to meet Cynthia on Interstate 505. She denied ever selling drugs to Cynthia on Borelli's behalf; hearing Borelli threaten to kill Cynthia; hearing Borelli say that Cynthia owed him money; or ever telling anyone that Borelli was responsible for the Bells' murders or had said he was, or that she herself was a witness to the killings. Neundorf admitted that in September or October 1992, Borelli commented that Cynthia Bell "shouldn't be allowed to even breathe the air." However, she did not believe this to be a threat. According to Neundorf: "Daryl thought that about a lot of people. It was a way to keep me home and not find out . . . what he was doing out and about." Neundorf never saw Borelli in a red Camaro or with a .357-magnum handgun. She denied she ever told defense investigator McClellan that Borelli told her "he had a gun that was used in the homicides of the Bells" which "he got rid of." Neundorf also denied Borelli had ever threatened her, or that she was afraid of him. On cross-examination by the People, Neundorf testified that when she was interviewed by defense investigator McClellan and the defense attorney, they tried to tell her things that she knew not to be true, without tape recording the interview or providing her with any report for her to review.

To contradict Borelli and Neundorf, the defense offered the testimony of several witnesses who claimed Neundorf had previously indicated that someone other than appellant had committed the murders. George McCleese testified that Neundorf told him she had witnessed the homicides, and appellant "wasn't the one that did it"; instead, she said they were committed by "[h]er boyfriend," without identifying him directly. Neundorf drove a green Ford pickup truck. McCleese talked with Anthony Hurtz about appellant when the two were in custody together in March 1993. According to McCleese, Hurtz told him appellant would not be convicted because appellant did not commit the murders, and the gun used in the killings was hidden in a storage shed on Leisure Town

Road. McCleese did not recall whether Hurtz said he was involved. He also testified he did not believe Hurtz, because of Hurtz's own reputation as a "loud talker" who liked to "make himself look big." McCleese was impeached with several felony convictions for burglary and receiving stolen property. He admitted he had previously testified that Neundorf did not tell him anything about witnessing the murders or her boyfriend committing the crimes.

To support McCleese's testimony and impeach Neundorf, appellant offered the double hearsay testimony of McCleese's mother, Helen Dixon, to the effect that the boyfriend of Dixon's daughter told Dixon that Neundorf had said she knew it was not appellant "that did the killing" because she (Neundorf) was there at the time. Dixon was not told who did commit the "killing," or even what murder(s) were being discussed. Appellant also offered the testimony of Diane McClure, a legal secretary, that while present at an interview of Matthew Cordell she heard Cordell state he had sold large amounts of methamphetamine to Borelli; he had witnessed drug transactions between Borelli and Cynthia Bell; and he had heard Borelli express anger against Cynthia because she had "burned" him, as Borelli rolled some bullets back and forth in his hand. When on the stand, Cordell himself denied making any of these statements. Cordell did testify he heard Sparks say he had been dropped off at the "country Oates store" while the victims "were being done."

*HURTZ*

Aside from this testimony purportedly linking Borelli to the murders, the defense offered evidence of the possible involvement of Anthony Hurtz. Hurtz himself testified that in October 1992 he made "[t]he majority" of his money in construction, doing "concrete work." He denied making money selling drugs; ever selling drugs to Cynthia Bell; or even knowing the victims, appellant, or any of the other principal individuals in this case. He denied any involvement in the Bells' murder or telling anyone he had been involved, and claimed he was at home with his girlfriend in Sacramento all night on October 26, 1992. He also denied possession of a .357 revolver in October 1992. He

admitted he had been convicted of at least one felony, and that he use to go "by the name of Leroy or Uncle Leroy."

To contradict and impeach Hurtz, appellant offered the testimony of several witnesses linking Hurtz to the murders. Hurtz's former girlfriend Chantelle Eittreim testified via transcript that she was living with Hurtz in late 1992, at which time he was heavily involved in drug trafficking, selling four to five pounds of methamphetamine every other day. At the time, he owned both .357-magnum and .38-caliber handguns. According to Eittreim, after receiving a page sometime after 10:00 p.m. on October 26, he told her he had to go to Dixon to meet "Ryan" because " '[s]ome bitch burned one of my friends, and I have to go take care of it.' " Eittreim accompanied Hurtz to Dixon where Hurtz met with Bernal in a restaurant for about 20 minutes while Eittreim remained outside. After Hurtz took her home, he left again and did not return until the next morning. Eittreim tried to page him several times during the night, but he did not respond. In December 1992, Hurtz told her the police were looking for him because they wanted to question him about the murders. He told her he had attended the meeting at which the killings were planned, and was also there when the victims were murdered. According to Eittreim, Hurtz told her "that [Cynthia] took it like a man," while "James was on the floorboard with his hands over his head begging not to be shot." After October 26, Hurtz changed the outer appearance of his automobile and started acting "paranoid." On cross-examination, Eittreim could not state Hurtz's pager number, conceded she did not like Hurtz, and admitted she was addicted to methamphetamine in October 1992.

Both of Eittreim's parents testified for the defense. Candida Eittreim testified that at first, Hurtz told her he had committed the murders of the Bells. Then he changed his story to having been involved in the murders. Finally, he told her he had only helped plan the killings and was there when they were committed. He asked for her help in getting an attorney, and her husband hired one for him. Later he threatened to kill her and her family if she testified in this matter. On cross-examination, Mrs. Eittreim admitted she

did not contact the police "right away" after Hurtz's alleged confession because she did not believe him; and when she was later contacted by the police, she "misled" and lied to them. Mr. Eittreim testified that in January 1993, Hurtz asked him to pick up a .357 revolver from a storage unit off Leisure Town Road in Vacaville. As soon as he did so, Mr. Eittreim turned it over to the police.

Kenneth Keith, yet another admitted methamphetamine abuser, testified he was rooming with Eittreim and Hurtz in October 1992. Keith did not think Hurtz came home on the night of October 26, although he had only "vague" recollection of that date and was using drugs at the time. According to Keith, in January or February 1993, Hurtz told him he knew Cynthia and did not like her because "[s]he had a big mouth and she talked a lot." Hurtz also told Keith he had seen the Bells on "[t]he night that it happened," and he knew who killed them but "he wasn't going to tell."

Harmina Ross, another former girlfriend of Hurtz and the mother of his child, testified he had begun dealing drugs in 1992. Although she tried paging him several times on October 26, he did not respond. In December 1992, Hurtz told her he had shot two people at close range while they were sitting in a Camaro in a vacant lot in Vacaville; the second person killed had begged not to be shot and "tried to get away." Later, Hurtz changed his story and told her he was only a suspect and was not responsible for the murders. Ross acknowledged that she did not come forward with Hurtz's confession until she was contacted by a defense investigator. When Ross subsequently spoke with the police, she did not mention Hurtz's confession.

Eliane West was a friend and neighbor of Hurtz in October 1992. She testified that Hurtz told her he was present at the planning of the murder of the two people in the white car out in the area of the Nut Tree. She did not relay this information to the police. According to West, Hurtz sent her a letter threatening that if she "said anything to anybody about him being there when they were planning it, that they would never ever find [West]. He would guarantee it." West was unable to produce the letter, claiming it

was stolen from her apartment. She did not remember the date on the letter or how many pages it was. She also testified that Hurtz had sent her two friendly notes from jail.

*BERNAL*

Finally, the defense also attempted to link Ryan Bernal to the murders through the testimony of several additional witnesses. Bernal himself did not testify because of his pending prosecution for the murder of Gibeau and his consequent invocation of the Fifth Amendment. The testimony of other defense witnesses was introduced to establish that Bernal had known Borelli for approximately 15 years and sold methamphetamine on his behalf. About one week before the date of the murders on October 26, 1992, Murphy introduced Bernal to appellant.

Ryan Vergos, who testified through transcript, lived with Bernal and his family in a mobile home on the property of his uncle George Santos. Bernal owned a faded black baseball-type cap. Vergos did not know appellant, and did not see appellant with Bernal on October 26. That evening, Bernal left in a small truck sometime between 8:30 and 9:00 p.m. Bernal did not come home until the next morning between 7:30 and 9 a.m. Bernal told Vergos that his uncle "helped him" with some killings in Vacaville. Several days later, Bernal told Vergos that it was actually appellant who had killed the Bells. Vergos testified that Bernal was a liar, and was very afraid of Borelli, for whom he sold methamphetamine. Cynthia Bell had purchased methamphetamine from Borelli regularly, and Vergos heard Borelli say she owed him money. A week before the murders, Borelli was furious because he needed $1,500 that Cynthia owed him, and "he wanted her taken care of."

Cordell told a defense investigator that Nissen said he had lied about appellant's involvement in the murders in order to protect Bernal. Nissen described Bernal as his "best friend," whom he had met through another drug client of appellant named Jason Kraak. Kraak in turn testified that Nissen had a "very bad reputation" for "making up stories, lying," and untruthfulness. Although Nissen never told Kraak he was going to lie or had lied in his testimony about appellant's involvement in the killings, he did say that

he, Murphy and Bernal had decided they were "going to put it off on" appellant. This was because Bernal "was young and had his whole life ahead of him," and because the police had played them a tape recording in which appellant threatened to kill Nissen.

On cross-examination, Kraak conceded that Nissen never said he was going to lie about appellant and the murders, and Kraak did not know whether or not Nissen's statement about "putting it off" on appellant was the truth. Kraak testified that a few days after the homicides, appellant told him that Cynthia Bell "was found with her head blown off from the jaw up." Appellant told Kraak that the police had shown him photographs of the victims when he was arrested; he asked Kraak if he had "ever seen what a .357 wadcutter does to a person." Appellant never told Kraak that he had killed the Bells, and Kraak never saw appellant with a gun.

***REBUTTAL AND SURREBUTTAL***

In rebuttal, the prosecution offered evidence Harmina Ross told the police that Hurtz had told her he was a suspect in the victims' murders but was not responsible for their deaths, and "he gave her reasons why." Ross never gave the police any information that Hurtz had confessed to the murders himself.

Officer Robert Lee testified that on November 2, 1992, Ringler's daughter Cynthia C. told him appellant carried his handgun wherever he went, and she had last seen him with it at approximately 6:00 p.m. on October 27, 1992. He was carrying it in a brown-colored, soft handgun case. According to Officer Lee, Cynthia C. had never mentioned appellant carrying a briefcase.

Finally, the prosecution offered evidence that in his initial contacts with the police, truck driver Russell Carter told the police that he had stopped his truck at the scene of the crime at approximately 6:50 a.m. on October 26, 1992, and approached the victims' car, at which point he observed that someone had been shot. Carter did not report that he actually saw the shootings take place, and did not mention the presence of any people other than the victims at the scene. Aside from reporting that he observed one "mid-sized, four-door Oldsmobile" leaving the area, Carter did not mention any other vehicles

in the area. Carter also told the police he thought the shootings must have been done by means of a rifle. The police did not follow up on Carter's report because it was totally inconsistent with the physical evidence at the scene, the fact the killings had been committed with a handgun, and the actual condition of the victims' bodies when found around the same time Carter claimed to have seen them.

In surrebuttal, the defense offered the testimony of an employee of the business to which Carter made a delivery at approximately 7:00 a.m. on October 27, 1992. He described Carter as looking "like he saw a ghost, . . . very distraught, very upset." Carter told him he had seen someone standing next to a car holding a gun pointed in the window, who then got into a brown car and drive away.

### *PROCEDURAL BACKGROUND*

Appellant was charged in February 1993 with three counts of first degree murder of three victims (James Bell, Cynthia Bell, and Jason Gibeau), with allegations of the special circumstance of multiple murder and of firearm use. (Pen. Code, §§ 187; 190.2, subd. (a)(3); 12022.5.)[8] In May 1993, appellant's section 995 motion to set aside the information was granted with respect to the charged murder of Gibeau.

Appellant's first two trials resulted in mistrials due to juror deadlock. Appellant's third jury trial commenced on February 24, 1995. On June 8, 1995, the jury convicted appellant of first degree murder on both counts, and found true the allegations of firearm use and multiple murder special circumstances. He was sentenced to life in prison without the possibility of parole, plus a term of 35 years. This appeal followed.

## II. SUFFICIENCY OF THE EVIDENCE TO CONVICT

Appellant's principal contention is that there was insufficient evidence to support the jury's verdict that he murdered Cynthia and James Bell. Based on our exhaustive

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[8] Unless otherwise indicated, all further statutory references are to the Penal Code.

review of the lengthy record, we conclude there was ample evidence to support the conclusion that appellant was guilty as charged.

***STANDARD OF REVIEW***

When the sufficiency of the evidence to convict is challenged on appeal, the critical inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319, original italics; see also *People v. Berryman* (1993) 6 Cal.4th 1048, 1083, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) An appellate court "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson, supra,* 26 Cal.3d at p. 578.)

In reviewing the evidence adduced at trial, our perspective must favor the judgment. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Barnes* (1986) 42 Cal.3d 284, 303-304; *People v. Matian* (1995) 35 Cal.App.4th 480, 483-484.) "This court must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] If the circumstances reasonably justify the trial court's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.] The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact; it is not whether guilt is established beyond a reasonable doubt. [Citation.] [¶] Before the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it. [Citation.]" (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) The standard stated by California cases is entirely consistent with the controlling federal law.

(*Jackson v. Virginia, supra,* 443 U.S. at pp. 318-319; *In re Winship* (1970) 397 U.S. 358, 362.)

There is no question that the prosecutor's burden is a heavy one. "To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence." (*People v. Hall* (1964) 62 Cal.2d 104, 112.) Nevertheless, even though "[e]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction" (*Redmond, supra,* 71 Cal.2d at p. 755), this court is bound by the findings of the trier of fact where, by its verdict, it has rejected an hypothesis pointing to innocence and there is evidence to support its implied finding that guilt is the more reasonable of the two hypotheses. Moreover, we must be ever mindful of the fact that it is the exclusive province of the trier of fact to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. (*Barnes, supra,* 42 Cal.3d at p. 303.) "Thus, even though the appellate court may itself believe that the circumstantial evidence might be reasonably reconciled with the defendant's innocence, this alone does not warrant interference with the determination of the trier of fact. [Citations.] Whether the evidence presented at trial is direct or circumstantial, . . . the relevant inquiry on appeal remains whether *any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Towler* (1982) 31 Cal.3d 105, 118, original italics.)

***SUBSTANTIAL EVIDENCE SUPPORTS THE VERDICTS***

Appellant argues that the prosecution's evidence of his guilt is undermined by his competing evidence (a)suggesting the victims were murdered after 10:30 p.m. on October 26, 1992, the time at which the prosecution witnesses testified that appellant returned home; (b) attacking the credibility of the prosecution witnesses; and (c) raising the possibility of third-party culpability involving Borelli, Hurtz and Bernal. This argument simply asks this court to reweigh the evidence and make different determinations of

credibility than those already made by the trier of fact. This we may not do. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.)

There was ample evidence to support of the jury's verdicts. Numerous witnesses testified that Cynthia Bell owed appellant money for drug transactions, and he had recently been deeply angered when he caught Cynthia sneaking into his house unannounced and entering his bedroom, evidently with the intent to steal from him. At least three witnesses—Murphy, Ruiz and Mathies—testified that appellant had threatened to kill Cynthia Bell during the few days immediately preceding the murders. Several witnesses, including his own brother, testified that when appellant returned home after 10:30 p.m. on the night of the murders, he was spotted with blood. His handgun also had blood on it, and contained four spent shells. He made incriminating statements to his brother and several other witnesses, saying he "did" Cynthia and James Bell and describing the impact of a .357-magnum bullet on a human head. Appellant's gun was found in a location tied to appellant and his girlfriend, and expert testimony established that one of the bullets recovered from the victims had definitely been fired from appellant's gun. Appellant fled from police in a high-speed chase when they attempted to take him into custody. Finally, he confessed his crime to a fellow inmate, tried to arrange to have his brother Edgar and his family injured in order to coerce Edgar to change his testimony, and even wrote down his brother's name and address to give to the other inmate.

Appellant's evidence does not undermine the substantiality of the prosecution case. His own testimony about his activities and whereabouts on the night of the murder was extraordinarily vague, particularly with regard to the critical time period between 7:00 and 10:30 p.m. Many details of appellant's testimony were actually in conflict with the testimony of other defense witnesses.[9] The physical evidence of the victims' bodies,

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[9] For example, Michel testified he was the first person appellant saw when the latter returned home the night of October 26, and they immediately went upstairs together.

found in a state of full rigor mortis as of approximately 11:00 a.m. on October 27, was consistent with placing the time of the murders around 10:00 p.m. the night before. On the other hand, the physical condition of the bodies was completely inconsistent with appellant's reliance on the testimony of truck driver Russell Carter, who claimed to see the murders take place at 6:50 a.m. on October 27, or just before the arrival of the police at 7:00 a.m., by which time the bodies were already stiff, cold and ashen.[10] The fact the victims' Camaro had its ignition in the "on" position with an empty gas tank and obvious carbon buildup below the exhaust pipe clearly indicated the car had been idling there for a lengthy period of time. In short, appellant's theory that the victims had been shot only minutes before the police arrived was unbelievable and completely contrary to all the other evidence in the case.[11]

Appellant's evidence of the purported third party culpability of Borelli, Hurtz and Bernal was both contradictory and weak. Other than alleged "confessions" by these individuals to others, there was no physical evidence linking them to the crime, and no witnesses to their activities on the night of the murders. Moreover, the supposed "confessions" were themselves ambiguous and self-contradictory. The witnesses who

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Appellant, in contrast, testified he went upstairs as soon as he came home that night; only later did someone come up to his bedroom to tell him Michel was there to see him.

[10] Needless to say, truck driver Carter's alleged observation of the murders at 6:50 a.m. is also inconsistent with the earlier discovery of the bodies sometime between 6:15 and 6:30 a.m. by William Patterson, the man who first called 911 and reported the murders to the police. Carter also gave the police several inconsistent versions of the event, including that he had not seen the actual murder and speculated that it had been committed with a rifle.

[11] Appellant actually offered a wide variety of possible times the victims could have been shot, based on the testimony of all the various defense witnesses who made ambiguous sightings of something suspicious taking place at the location of the murders at different times of the night and morning of October 26 and 27. Appellant's own contradictory evidence, obviously offered in the hope of raising some "reasonable doubt" in the minds of the jurors, was insufficiently substantial to offset the substantial evidence of appellant's guilt.

testified to these confessions themselves lacked credibility, either because they had personal motives rendering them hostile to the alleged suspects or biased in favor of appellant; or because of their own failure to give timely, truthful information to the police. In light of the prosecution evidence of appellant's threats against the victims prior to the murders, his bloody clothing and gun on the night of the killings, his admissions to several witnesses, the discovery of appellant's gun and its establishment as the murder weapon, and appellant's high-speed flight from the police, the jury was not required to accept this flimsy defense evidence.

Finally, appellant's attack on the credibility of the prosecution's witnesses does not render insufficient the evidence of appellant's guilt. These arguments were made by defense counsel at trial, and were rejected by the jury. It was exclusively for the jury, as the ultimate arbiter and finder of fact, to assess and adjudge the credibility of all the witnesses, both prosecution and defense. In the absence of clear evidence that the jury's determination of credibility was egregiously arbitrary, capricious and irrational, we will not disturb that determination. (*Barnes, supra,* 42 Cal.3d at p. 303; *Towler, supra,* 31 Cal.3d at p. 118.)

### III. PROPRIETY OF CONTINUED JURY DELIBERATIONS

Appellant contends the trial court erred in responding to the jury foreperson's report that the jury was deadlocked by determining that additional deliberations would be appropriate. Appellant is wrong; there was no abuse of the trial court's discretion.

#### *PROCEDURAL BACKGROUND*

On May 16, 1995, after 11 days of deliberations, the jury sent the trial court a note from the foreperson stating that she believed "we are deadlocked at this point," and asking the trial court: "Do you have any suggestions for us regarding what we might do to break the deadlock?" The trial court called the jury into the courtroom and asked the foreperson whether (a) if the jury continued in its deliberations, the foreperson thought there was a reasonable possibility that the jury might arrive at a verdict; and (b) whether there was anything further the trial court could do to assist the jury in arriving at a verdict.

The foreperson responded that the jurors were "just looking for . . . anything that the Court might suggest that we could try to do to break the deadlock." The trial court inquired how the jury was split, and was told that after four votes, the jury was split seven to five.

The trial court admonished the jurors that each party had a right to the jurors' own individual opinions; "everybody is entitled to their own opinion as a juror"; the jurors should "unhesitatingly change" their votes if they were shown to be wrong during deliberations; "until you are convinced that you are wrong, then you should stick to your vote"; "if a verdict can be reached, then we want a verdict to be reached"; and "[i]f a verdict can't be reached, then that's just the way it is." The trial court then polled the jury to determine whether they individually believed further deliberations would be useful. Seven jurors agreed with the foreperson that their deliberations "hopelessly deadlocked"; one "[h]esitantly" agreed; one was undecided; and two disagreed. On the basis of this poll, the trial court sent the jurors back to deliberate further, again instructing "that if you are convinced that you are wrong, then you should change, [but] if you are not convinced, . . . you should stick with you own vote . . . ." The trial court told the jurors it would check with them the next day "as to what, if any, progress" had been made, "and if not, then we can go from there again."

At that point, the foreperson asked for further clarification of the concept of reasonable doubt. The trial court told the foreperson to reread the instruction, and added that "it's really you, as individual jurors, when you read that instruction, to apply it and then give it the meaning to which you feel it's entitled." Thereafter, the jury deliberated for two days without communicating with the court. On May 19, the jury requested a readback of some portions of trial testimony, and informed the court it had selected a new foreperson. On May 22, the trial court suggested making an inquiry about whether the jurors felt they were making progress, but the prosecutor objected on the ground that "[t]hey're obviously working," and "if they haven't brought the subject matter up with the

Court, we shouldn't be bringing that up." The jury was brought in, and the new foreperson indicated the jury's willingness to continue deliberations the next day.

On June 1, the trial court sua sponte asked the jury to come into the courtroom to inquire whether there had been any progress in the deliberations. At that time, the new foreperson stated: "Yes, there has been some change." The trial court reread CALJIC No. 17.40 instructing the jury that both sides were entitled to the individual opinion of each juror; each juror was to decide the case for him or herself, after discussing the evidence and instructions with the other jurors; and although each juror was not to hesitate to change an opinion if convinced it was wrong, he or she was not to decide any question in a particular way just because a majority of the jurors, or any of them, might favor such a decision. Upon seeing "all affirmative nods" from the jurors in response to its question whether further deliberation would be helpful, the trial court sent them back to deliberate. On June 8, the jury returned verdicts of guilty on both counts.

***APPLICABLE LAW***

Under Penal Code section 1140, "[e]xcept as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." Generally, "[t]he determination whether there is reasonable probability of [jury] agreement rests in the discretion of the trial court. [Citations.] The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' [Citation.]" (*People v. Breaux* (1991) 1 Cal.4th 281, 319; see *People v. Pride* (1992) 3 Cal.4th 195, 265; *People v. Rodriguez* (1986) 42 Cal.3d 730, 775.)

The issue of coercion is necessarily dependent on the facts and circumstances of each case. (*People v. Sandoval* (1992) 4 Cal.4th 155, 195.) On the one hand, coercion has been found where a trial court, by insisting on further deliberations, expresses an

opinion that a verdict should be reached. (*People v. Crossland* (1960) 182 Cal.App.2d 117, 119; *People v. Crowley* (1950) 101 Cal.App.2d 71, 75.) On the other hand, a trial court's refusal to discharge a jury in the face of the jury's repeated reports of impasse does not necessarily amount to an implied suggestion to the jury that a verdict should be reached. (*Rodriguez, supra,* 42 Cal.3d at p. 775.)

Thus, it is neither an abuse of discretion nor inherently coercive for a trial court to inquire into the numerical division of the jury in an attempt to determine whether there is any reasonable probability of agreement, or to ask for a resumption of deliberations after ascertaining the breakdown in juror voting. (*Breaux, supra,* 1 Cal.4th at p. 319; *People v. Sheldon* (1989) 48 Cal.3d 935, 958-960; *Rodriguez, supra,* 42 Cal.3d at pp. 775-776, fn. 14; *People v. Carter* (1968) 68 Cal.2d 810, 817.) Similarly, it is not necessarily coercive for a trial court to ask a jury to resume deliberations more than once, even after the jury has deliberated for several days and repeated polling shows the jurors are unanimously negative about the prospects for a verdict. (*Breaux, supra,* 1 Cal.4th at p. 319 [jury twice asked to resume deliberations after four days of deliberations despite polling showing all jurors negative on prospect of a verdict; held, no coercion]; *Rodriguez, supra,* 42 Cal.3d at pp. 775-776 [jury asked to resume deliberations after 18 days of deliberation and 4 impasses; held, no coercion].) A trial court does not abuse its discretion or coerce the jury by inquiring into the numerical division of voting and individually polling the jurors in an effort to see if there was anything the court could do to assist the jury in its deliberations to reach a verdict, as long as the court makes no threats or other statements that could be interpreted either as suggesting that a verdict must be reached, or as exerting undue pressure on any individual juror. (*Breaux, supra,* 1 Cal.4th at pp. 319-320; *Carter, supra,* 68 Cal.2d at p. 815; *People v. Thomas* (1991) 231 Cal.App.3d 299, 303; *People v. Duran* (1983) 140 Cal.App.3d 485, 501-502.)

Because a trial court is charged with determining whether there is a reasonable probability of agreement, it may properly determine that further deliberation might be beneficial even if the jurors unanimously express the opposite opinion. Where even a



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single juror expresses the opinion that consensus might be reached if further clarifying instructions are given, it is not an abuse of discretion for the trial court to respond affirmatively to the suggestion. (*People v. Proctor* (1992) 4 Cal.4th 499, 539; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 522; *People v. De La Roi* (1944) 23 Cal.2d 692, 701; *Thomas, supra,* 231 Cal.App.3d at p. 303.) Indeed, because one of the primary duties of the trial court is to help the jury understand the legal principles it is asked to apply, "a court must do more than figuratively throw up its hands and tell the jury it cannot help." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

***DISCUSSION: NO COERCION OR ABUSE OF DISCRETION***

Appellant asserts that the trial court abused its discretion by requiring further deliberation after the foreperson reported the jury was deadlocked. The assertion is meritless, both on the law and on the facts of the record in this case.

That record clearly shows the trial court did nothing to coerce the jury, and did not abuse its discretion in having the jurors continue their deliberations after inquiring into the numerical division of voting and individually polling the members in an effort to see if there was anything it could do to assist them in their deliberations to reach a verdict. The trial court made no threats or other statements that could be interpreted as exerting undue pressure on any juror; nor did it ever indicate that it was necessary for the jury to reach a verdict. The trial court never expressed an opinion on appellant's guilt or innocence of the charges; nor did it comment on the evidence. Indeed, appellant's assertions notwithstanding, the trial court specifically told the jury they were not required to return a verdict.[12]

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[12] The trial court stated: "If after there's a vote or two votes or three votes or, as in your case, four votes, if you are shown that you are wrong or that the evidence does not support your vote, then you should, as the law says, unhesitatingly change. [¶] But until you are convinced that you are wrong, then you should stick to your vote, and that's what was carefully pointed out by both attorneys, and that's the law that I gave you during the instructions. [¶] So with that, the question then boils down, if you wish further

Thus, the trial court specifically reinstructed that (a) each party had a right to the jurors' own individual opinions and each juror was entitled to his or her own opinion; (b) each juror was to decide the case for him or herself, after discussing the evidence and instructions with the other jurors; (c) although the jurors should "unhesitatingly change" their votes if they were shown to be wrong during deliberations, they should not decide any question in a particular way just because a majority of the jurors, or any one of them, might favor such a decision; (d) "until you are convinced that you are wrong, then you should stick to your vote"; (e) the individual jurors should interpret and apply the instructions themselves; and (f) although a verdict should be reached if possible, "[i]f a verdict can't be reached, then that's just the way it is." The trial court only had the jury continue deliberations after it became apparent that some jurors believed further deliberations would be useful, and that it would be possible to reach a verdict.

On this record, the trial court's actions were clearly not coercive and not an abuse of discretion. (*Breaux, supra,* 1 Cal.4th at pp. 319-320; *Carter, supra,* 68 Cal.2d at p. 815; *Rodriguez, supra,* 42 Cal.3d at pp. 775-776, fn. 14; *Thomas, supra,* 231 Cal.App.3d at p. 303; *Duran, supra,* 140 Cal.App.3d at pp. 501-502.) There was no error.

## IV. EDITING OF TESTIMONY READBACKS

Appellant next contends the trial court committed prejudicial error by editing some of the testimony readbacks requested by the jury. Specifically, appellant claims the trial court's editing of some of jailhouse informant Jacobitz's trial testimony at the time of its readback to the jury violated appellant's right to have the jurors apprised of all the evidence in the record. The contention is meritless.

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deliberation, and you have been in deliberation for quite a period of time—and all of you, the Court knows, were very attentive throughout the trial. We went through a long time. . . . But if a verdict can be reached, then we want a verdict to be reached. If a verdict can't be reached, then that's just the way it is. It's not to—because everybody is entitled to their own opinion as a juror."

At issue is the jury's requested readback of a portion of the trial record relating to appellant's jailhouse conversations with Jacobitz. The jury asked for a readback of the testimony of both appellant and Jacobitz on the subject of what appellant told the latter about this case, and their conversation in the jailhouse library. Later, the jury asked to rehear portions of both individuals' testimony concerning "descriptions of blood and skull pieces" and "gun(s)." In consultation with counsel, the trial court edited the transcripts of appellant and Jacobitz for purposes of readback, striking portions regarding conversations between appellant and *other prisoners* because "[t]hat doesn't respond to the question they're talking about." Defense counsel objected and asked the court to read back large portions of cross-examination. However, the trial court concluded that these portions were outside the scope of the jury's request, which was for a readback of testimony on the *conversations between appellant and Jacobitz*.

The trial court was not required to accede to defense counsel's request. It is the jury's right to have testimony reread, not that of the parties or their attorneys. The trial court's obligation is simply to comply with the *jury's* request. (§ 1138; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1020; *People v. Cooks* (1983) 141 Cal.App.3d 224, 261; *People v. Butler* (1975) 47 Cal.App.3d 273, 284.) Here, the material sought to be included by the defense in the readback was clearly outside the scope of the jury's request. The jury did not ask for testimony about conversations between appellant and other prisoners in the jail, or about other places where Jacobitz might have gleaned information about appellant's case. It simply asked for a readback of testimony about what Fry told Jacobitz in their own private conversations. The trial court was under no obligation to have Jacobitz's cross-examination read, or any other portion of the record not encompassed by the jury's specific request. (*People v. Cathey* (1960) 186 Cal.App.2d 217, 222.) The jury did not ask for any further readbacks. We may assume that if the testimony actually read to them did not contain the material they wished to hear, they would have said so. (*People v. Gordon* (1963) 222 Cal.App.2d 687, 689.)

Contrary to appellant's assertion, it is not reasonably probable a result more favorable to himself would have occurred had the redacted portions of the testimony also been reread. Jacobitz's testimony was corroborated by the notes he took during his library conversation with appellant, and the slip of paper given to him by appellant with Edgar Fry's name and address. It is not reasonably probable that rereading appellant's testimony that Jacobitz learned these facts by overhearing appellant's jailhouse conversations with other prisoners—which testimony of course the jury had already heard—would have resulted in appellant's acquittal. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)[13]

## V. SANITIZATION OF HURTZ'S CONVICTIONS

Appellant argues the trial court erred by permitting the defense to cross-examine Hurtz about his two prior felony convictions, but disallowing it from eliciting the fact that those convictions were for drug-related offenses. There was no error.

After appellant called Hurtz as a witness, defense counsel questioned him about his sources of income in October 1992. When Hurtz testified that he worked as a construction worker, defense counsel asked the following leading question: "And weren't you, in fact, making your money dealing drugs at that time, Mr. Hurtz?" The trial court sustained objections to this question on grounds of both relevance and the fact it was leading. Under further questioning, Hurtz testified that he made "[t]he majority" of his money from construction, and that he did "[n]ot" have "another source of income at or about the time of October of 1992." When defense counsel then attempted to ask Hurtz if it was true he had been convicted of a particular crime, the trial court interposed and ruled: "My feeling would be you could ask him if he has been convicted of a felony, and I'll allow if he's been convicted of a felony, if that answer is true, but not what felony."

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[13] Appellant failed to request any instruction pursuant to CALJIC No. 3.20 cautioning the jury about the credibility of jailhouse informants, an instruction that need only be given if

Thereafter, defense counsel was only able to elicit Hurtz's admission of at least one felony conviction.

Later, defense counsel objected on the record to the trial court's ruling, arguing that Hurtz had in fact been convicted of two felonies—sale and possession for sale of drugs—and that both felonies were crimes of moral turpitude. The trial court ruled that although appellant could impeach Hurtz's credibility with the fact of his felony convictions, the nature of the crimes of which he was convicted "is of no relevance."

Under California Constitution, article I, section 28, subdivisions (d) and (f), trial courts have broad power to exercise discretion under Evidence Code section 352 (hereinafter referred to as section 352) to permit the use of prior felony convictions for impeachment purposes, so long as the convictions are of crimes involving "moral turpitude." (*People v. Castro* (1985) 38 Cal.3d 301, 306, 312-317.)[14] In addition, trial courts have broad discretion to "sanitize" such prior convictions, in order to reduce a demonstrable potential for unfair prejudice. (*Sandoval, supra,* 4 Cal.4th at pp. 177-178; *People v. Mickle* (1991) 54 Cal.3d 140, 172; *People v. Collins* (1986) 42 Cal.3d 378, 387-389; *People v. Foreman* (1985) 174 Cal.App.3d 175, 179-182.) Thus, a ruling refusing to permit impeachment with a prior conviction is reviewed for abuse of discretion. (Cal. Const., art. I, § 28, subd. (f); *Castro, supra,* 38 Cal.3d at p. 306; *People v. Gordon* (1990) 50 Cal.3d 1223, 1239; *People v. Dewey* (1996) 42 Cal.App.4th 216, 220; *People v. Stewart* (1985) 171 Cal.App.3d 59, 65.)

Under section 352, a trial court may in its discretion exclude material evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create a substantial danger of undue prejudice.

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requested by a party. He has therefore waived that issue. (§ 1127a; *People* v. *Daya* (1994) 29 Cal.App.4th 697, 714.)

14 The Supreme Court has defined "moral turpitude" as a "'readiness to do evil,'" or "any character trait which can reasonably be characterized as 'immoral.'" (*Castro, supra,* 38 Cal.3d at pp. 314-317, & fn. 13.)

confusion of the issues, or misleading the jury. The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules. (*Stewart, supra,* 171 Cal.App.3d at p. 65; *People v. Yu* (1983) 143 Cal.App.3d 358, 377.) We will not overturn or disturb a trial court's exercise of its discretion under section 352 in the absence of manifest abuse, upon a finding that its decision was palpably arbitrary, capricious and patently absurd. (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1124-1125; *People v. Robbins* (1988) 45 Cal.3d 867, 880-881; *People v. Adams* (1980) 101 Cal.App.3d 791, 799; *People v. Cordova* (1979) 97 Cal.App.3d 665, 670.) "The [trial] court's exercise of discretion under Evidence Code section 352 will not be disturbed on appeal unless the court clearly abused its discretion, e.g., when the prejudicial effect of the evidence clearly outweighed its probative value." (*People v. Brown* (1993) 17 Cal.App.4th 1389, 1396.)

There was no abuse of discretion in this case. The trial court was clearly entitled to make a discretionary determination on the admissibility of Hurtz's prior felony convictions under section 352. As appellant points out, the trial court simply ruled that the nature of the crimes of which Hurtz had been convicted was irrelevant; it did not explicitly base its ruling barring admission of this evidence on a section 352 analysis. However, in stating that the evidence was "irrelevant," the court essentially made a dispositive determination for section 352 purposes, since evidence that is irrelevant cannot be probative, without regard to any question of prejudice. Hurtz's prior felony convictions were relevant to *impeach* his *credibility* as a *witness* only, *not* to prove his prior conduct. (*Castro, supra,* 38 Cal.3d at pp. 306, 312-316, 322-323; *Stewart, supra,* 171 Cal.App.3d at pp. 63-66.) It is patently clear from appellant's defense strategy at trial as well as his arguments on appeal that his purpose was to convince the jury that, given his drug convictions, Hurtz was probably involved in drug trafficking in 1992. Such an inference in beyond the scope of impeachment for credibility purposes. For this reason, the trial court's decision not to permit the admission of this evidence did not exceed the

bounds of reason. (*Sandoval, supra,* 4 Cal.3d at p. 178; *People v. Massey* (1987) 192 Cal.App.3d 819, 825; *Stewart, supra,* 171 Cal.App.3d at p. 65.)

Appellant also urges that the precise nature of Hurtz's prior convictions was admissible to impeach his testimony that his only source of income was his employment as a concrete worker and denying that he sold drugs. In fact, Hurtz testified that he made "most" of his money from construction work; he never actually denied selling drugs. Given the lack of such direct testimony, Hurtz's drug convictions were not relevant to impeach his testimony, and the trial court's discretionary decision sanitizing his testimony was not unreasonable.[15] (*People v. Clair* (1992) 2 Cal.4th 629, 655.)

## VI. EXCLUSION OF EVIDENCE OF BORELLI'S ALLEGED CONDUCT

Next, appellant contends the trial court erred by preventing the defense from presenting certain evidence in support of its third party culpability theory, to the effect that Borelli had engaged in conduct "similar" to that involved in this case. Once again, the contention is meritless.

### *PROCEDURAL BACKGROUND*

At issue is appellant's attempt to convince the jury that the Bells' murders were ordered or instigated by Borelli and performed by persons other than appellant, through the introduction of evidence to the effect that various allegedly "independent" witnesses had heard Borelli (a) complain victim Cynthia Bell owed him a drug debt, (b) state "he wanted her taken care of," and (c) subsequently admit having ordered the Bells' murder. In support of this theory, appellant sought to introduce alleged "character" evidence to the effect that, on various other occasions, Borelli had asked people to "take care of" *other* individuals with whom he was having difficulties.

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[15] In any event, given the substantial evidence supporting appellant's guilt and Hurtz's admission that he had been convicted of an unnamed felony, it is not reasonably probable that permitting the defense to establish that Hurtz had been convicted of selling drugs would not have tipped the balance in this case in favor of acquittal. (*Watson, supra,* 46 Cal.2d at p. 836.)

Thus, appellant moved in limine to permit the introduction of testimony regarding three alleged incidents supposedly "similar" to the Bells' murders. In the first alleged incident, Bernal allegedly asked Vergos to "take care of" Debra Neundorf for Borelli. Vergos refused. Borelli then asked Neundorf to meet him "in a somewhat isolated location" on the side of a road just off Interstate 505. There, Borelli and Neundorf had an angry conversation. Borelli pulled out a gun and fired three times, shouting " 'you need to be like George, dead.' " Neundorf was able to avoid the shots, and Borelli "sped off." In the second alleged incident, Bernal approached appellant and asked him to "get rid of a guy named Rick for Borelli." Appellant refused, but later confronted Borelli, "who confirmed that he wanted Rick harmed." In the third alleged incident, Bernal confided to Murphy that he and Borelli had planned "to get rid of" appellant. Bernal offered to introduce Murphy to the people who were to commit the homicide, but Murphy refused.

During the colloquy with the trial court concerning this motion, the trial court pointed out that all of the testimony concerning the incidents was hearsay and asked, "How am I going to get those in?" The trial court then denied the motion in limine *without prejudice*, expressly in order to permit defense counsel to renew the motion when seeking to introduce the testimony during trial. However, appellant did not attempt to introduce this evidence again.

***EVIDENCE OF ALLEGED PRIOR MISCONDUCT TO PROVE THIRD-PARTY CULPABILITY***

The fact that an individual may have committed other offenses in the past may be evidence of his or her bad character, or propensity or disposition to commit the crime charged. As a general rule, evidence of a person's character or character trait, whether in the form of an opinion, reputation, or specific instances of conduct, is inadmissible when offered to prove that person's conduct on a given occasion. (Evid. Code, § 1101, subd. (a).) If evidence of prior misconduct, bad acts or offenses is offered only for this purpose, it must be excluded. (*People v. Thompson* (1980) 27 Cal.3d 303, 316-317; *People v. Baskett* (1965) 237 Cal.App.2d 712, 715, overruled on other grounds in *People*

*v. Kelley* (1967) 66 Cal.2d 232, 243, fn. 5; 1 Witkin, Cal. Evidence (3d ed. 1986) Circumstantial Evidence, § 356, pp. 325-326.)

However, where the purpose of introducing evidence of other crimes, uncharged offenses or prior bad acts is not to show bad character or a disposition to commit a crime, but instead is to establish some other independent material fact in issue in the case, the evidence may be admissible for that particular limited purpose. (Evid. Code, § 1101, subd. (b); *People v. Haslouer* (1978) 79 Cal.App.3d 818, 825; 1 Witkin, Cal. Evidence, *supra,* Circumstantial Evidence, § 357, pp. 326-328.) Thus, among other things, evidence of prior misconduct is admissible if relevant to prove identity, opportunity, intent, or common design, method, scheme or plan. (Evid. Code, § 1101, subd. (b); *People v. Balcom* (1994) 7 Cal.4th 414, 422; *People v. Ewoldt* (1994) 7 Cal.4th 380, 399-402; *Haslouer, supra,* 79 Cal.App.3d at p. 825; CALJIC No. 2.50 (1994 rev.) (5th ed. supp.); 1 Witkin, Cal. Evidence, *supra,* Circumstantial Evidence, § 357, pp. 326-328.) This analysis also applies to "proposed evidence regarding prior criminal conduct of a third party alleged to have committed the charged offense." (*People v. Davis* (1995) 10 Cal.4th 463, 501.) In such a case, the proffered third party culpability evidence must "show a fact other than the third party's criminal disposition, such as motive or intent," or else it "does not amount to direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Ibid.*)

Appellant now contends the trial court prejudicially erred in limiting his right to present a defense based on third party culpability by introducing evidence of alleged prior similar conduct under Evidence Code section 1101. According to appellant, the evidence of Borelli's alleged acts and behavior with regard to persons other than the victims in this case was admissible as relevant to prove a common scheme, design or plan. (Evid. Code, § 1101, subd. (b); *Balcom, supra,* 7 Cal.4th at p. 422; *Ewoldt, supra,* 7 Cal.4th at pp. 399-402; *Haslouer, supra,* 79 Cal.App.3d at p. 825; CALJIC No. 2.50 (1994 rev.) (5th ed. supp.); 1 Witkin, Cal. Evidence, *supra,* Circumstantial Evidence, § 357, pp. 326-328.)

Evidence of an individual's previous uncharged misconduct may be relevant and admissible where the uncharged misconduct and the charged offense share sufficient common features to support the inference that they are both manifestations of a common design or plan. (*People v. Ewoldt, supra,* 7 Cal.4th at pp. 401, 403.) In determining whether evidence of the uncharged prior misconduct is relevant to demonstrate a common design, method or plan, the court must consider the nature and degree of similarity between the uncharged misconduct and the charged offense. (*Id.* at p. 402.) The degree of similarity required to establish a common design, method, scheme or plan is greater than that required to prove intent, but less than the high degree of similarity required to prove identity. (*Id.* at pp. 402-403.) In order to establish a common design or plan, the evidence of prior uncharged misconduct must demonstrate not just a mere similarity in results, but such a " 'concurrence of common features' " that the various events are naturally explained as the individual manifestations of a general design, method, scheme or plan rather than merely a series of similar spontaneous acts. (*Id.* at p. 402.)

The Supreme Court in *Ewoldt* requires a two-step analysis before prior uncharged offenses are admitted in a subsequent trial on charges of similar offenses: the initial analysis under Evidence Code section 1101; and an additional analysis under Evidence Code section 352 to determine whether the probative value of the uncharged prior offenses was substantial enough to outweigh the prejudice inherent in all such evidence. (*Ewoldt, supra,* 7 Cal.4th at pp. 404-407.) It is not necessary that the trial court specifically mention Evidence Code section 352 in making this analysis, although it is better practice to do so. What is essential is that the record show the trial court in fact weighed prejudice against probative value. (*People v. Zapien* (1993) 4 Cal.4th 929, 960; *People v. Heishman* (1988) 45 Cal.3d 147, 170.) This determination is committed to the sound discretion of the trial court, and will not be reversed on appeal absent a clear abuse of discretion. (*People v. DeRango* (1981) 115 Cal.App.3d 583, 589-590.)

The underlying inference supporting the admission of prior bad act evidence is that, if the individual committed the former act and did so in a particular fashion, he or

she must also have committed the charged crime, in the same way or with the same intent. (*People v. Diaz* (1992) 3 Cal.4th 495, 561-562; *Robbins, supra,* 45 Cal.3d at p. 879; *People v. Wade* (1988) 44 Cal.3d 975, 990; *Thompson, supra,* 27 Cal.3d at p. 315; *Haslouer, supra,* 79 Cal.App.3d at pp. 827-828.) No matter for which purpose the prior act evidence is admitted—whether to show "identity," "intent," or the existence of a "common scheme or plan" pursuant to which the charged act allegedly occurred—the essential foundational premise for admission of the uncharged acts is that *the alleged acts were actually committed by the individual in the first place.* Unless this fundamental precondition is met, evidence of uncharged acts can have no materiality to the charged offense, and cannot form the basis for any reasonable inferences about the individual's intent, plan, or identity as the perpetrator. (*People v. Albertson* (1944) 23 Cal.2d 550, 576-581; *People v. Martinez* (1992) 10 Cal.App.4th 1001, 1006-1008; *People v. Dellinger* (1984) 163 Cal.App.3d 284, 298-300; *People v. Long* (1970) 7 Cal.App.3d 586, 590; *People v. Jackson* (1967) 254 Cal.App.2d 655, 658-660.)

***DISCUSSION: APPELLANT'S PROFFERED EVIDENCE WAS INADMISSIBLE***

The short answer to appellant's contention that the trial court erred in not permitting him to introduce the subject "evidence" in this instance is that there was no competent evidence to be admitted. Even if relevant, hearsay evidence is inadmissible except as provided by law. (Evid. Code, § 1200, subd. (b).) Appellant never responded to the trial court's expressed concern that the entirety of the proffered testimony constituted inadmissible hearsay. Certainly, he did not establish that it came within any particular exception to the hearsay rule. As the proponent of this evidence, appellant bore the burden of establishing the necessary foundation for its admission. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1177.) We will not assume error in the absence of any record affirmatively supporting such a foundation. Having failed to proffer competent, admissible evidence that Borelli had *actually engaged in* the supposedly "similar" prior acts or that any of these alleged incidents *actually occurred*, appellant cannot possibly

assert error in the trial court's refusal to admit this testimony under Evidence Code 1101. (Evid. Code, § 354; *Ramos, supra,* 15 Cal.4th at pp. 1177-1178.)[16]

## VII. ADMISSION OF EVIDENCE OF APPELLANT'S BEHAVIOR TOWARD MURPHY

In a corollary to the preceding argument, appellant urges that because his proffered "bad acts" evidence against Borelli was excluded, the trial court should also have excluded the evidence of appellant's threatening behavior toward Murphy. There is no merit to the contention.

The crucial difference between the two situations is both obvious and determinative. As seen, there was no competent evidence proffered concerning Borelli's alleged prior threats or misdeeds against third persons. On the other hand, Murphy herself testified at length about how appellant took her for a long drive along deserted country backroads, stopped his pickup truck in an isolated location, threatened her life over a drug and money dispute, fired his .357-magnum out of the window, and told her he "was going to get to the bottom of this." Murphy's direct testimony about appellant's words and actions toward her indisputably distinguishes this incident from those alleged by appellant of Borelli.

By the same token, there is no question the evidence of appellant's behavior toward Murphy was admissible to prove motive, opportunity, intent, preparation, plan, knowledge and potential identity. The incident evidenced appellant's practice of using his gun to threaten people over drug and money disputes, his method of going to an isolated spot to do so, and his stated desire and intent to kill those who he perceived as cheating him. This incident, occurring only two days before the subject murders, clearly

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[16] For example, appellant has never offered *any* evidence to support his assertions about Borelli's alleged attempts to shoot Neundorf during an argument with her on a side road off Interstate 505. As appellant concedes, Neundorf herself *denied* that Borelli ever threatened her or that she was afraid of him. Appellant does not suggest what sort of competent evidence could contradict the testimony of the only two people purportedly

demonstrates motive, plan, intent and identity. There was no error or abuse of discretion in admitting this evidence.

## VIII. EXCLUSION OF TESTIMONY OF DEFENSE WITNESS MAPLES

Appellant argues the trial court denied him his constitutional right to present a defense and to a fair trial by excluding the testimony of defense witness Pamela Maples to the effect that she overheard Hurtz confess to two killings committed under circumstances similar or matching those of the murders at issue in this case. To the contrary, the record demonstrates there was no error or violation of appellant's constitutional rights.

### *FACTUAL AND PROCEDURAL BACKGROUND*

Defense witness Pamela Marie Maples testified that Hurtz was her cousin. According to Maples, while at her sister's house in Vallejo in April 1994 she "overheard" Hurtz discussing some homicides. After the trial court sustained the prosecution's objection to the admission of Maples' testimony as to what she heard Hurtz say, the defense made an offer of proof that Maples overheard him say he had killed a man and a woman in a car in Vacaville, and was covered with blood as a result.

Under questioning outside the presence of the jury, Maples testified that she was present with her sister, Hurtz, and "a guy named Steve" at a conversation in which Hurtz allegedly said he had killed a man and a woman in a car. Maples was "in and out of the room" at the time, only heard "bits and pieces" of the conversation, and never joined in it. The conversation was already underway when she came in; she did not know how long they had been discussing the murders, the context of the discussion, or whether it was "serious" or not. Nevertheless, Maples testified that Hurtz said he shot "[t]he girl" "[i]n the head" first, and "[t]hen he reached over and shot the guy." Hurtz said they were in a parking place, but did not otherwise describe the locale of the murders or the type of car

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present at the alleged incident. Similar difficulties exist with respect to the hearsay evidence regarding the other two allegedly "similar" incidents.

the victims were in. Afterward, according to Maples' version of what Hurtz said, "he was full of blood" and "ran through a field, threw mud up on himself, and then went to make the phone call for somebody to pick him up." Maples "didn't hear" Hurtz say when the murders took place. Under cross-examination, she acknowledged that she had no idea whether the murders took place one week or 10 years before the conversation, or whether they took place in California or somewhere else.

The trial court sustained the prosecution objection, stating the defense had failed to establish sufficient foundation to permit Maples to testify as to the alleged statements of Hurtz, because there was insufficient evidence to connect the details of the incident allegedly described by Hurtz to the facts of the murders at issue in this case.

***APPLICABLE LAW***

A criminal defendant has the right to present evidence of third party culpability if it is capable of raising a reasonable doubt about the defendant's own guilt. (*People v. Hall* (1986) 41 Cal.3d 826, 833; *People v. Von Villas* (1992) 10 Cal.App.4th 201, 264.) However, a trial court is not required to permit the admission of *any* evidence, however remote, to show a third party's culpability. "[T]here must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Hall, supra,* 41 Cal.3d at p. 833; see also *People v. Clark* (1992) 3 Cal.4th 41, 131; *Sandoval, supra,* 4 Cal.4th at p. 176.)

The mere possibility that some third person committed the crime is not enough. In order to place reasonable limits on the trial of collateral issues and avoid undue prejudice to the People from unsupported jury speculation on the possible guilt of other suspects, there must be some competent and substantial proof of a *probability* that this actually happened. (*People v. Green* (1980) 27 Cal.3d 1, 22, overruled on other grounds in *Hall, supra,* 41 Cal.3d at p. 834, fn. 3; *People v. Perry* (1980) 104 Cal.App.3d 268, 272; *People v. Whitney* (1978) 76 Cal.App.3d 863, 869-870.) Even if a defendant's evidence is found to raise a reasonable doubt, the evidence may still be excluded in the discretion of the trial court if its probative value is substantially outweighed by the risk of undue delay,

prejudice, or confusion of the issues. (§ 352; *Hall, supra,* 41 Cal.3d at pp. 829, 834; *Von Villas, supra,* 10 Cal.App.4th at p. 265.) An appellate court should not disturb the trial court's exercise of its wide discretion in making this determination unless there has been a manifest abuse of discretion resulting in a miscarriage of justice. (*People v. Milner* (1988) 45 Cal.3d 227, 239; *People v. Harlan* (1990) 222 Cal.App.3d 439, 446.)

***DISCUSSION: NO ABUSE OF DISCRETION***

The trial court did not abuse its discretion in excluding Maples' testimony in this case. Even if her testimony was fully credited, there was simply insufficient evidence to connect the murders she heard Hurtz describe, with the ones at issue here. Although Hurtz allegedly said he shot a man and a woman sitting in a car in a "parking place," Maples did not know when or where the killing occurred, or even if Hurtz was seriously describing an act he had himself committed. There was no mention of Cynthia or James Bell, and indeed no identification of the alleged victims' of Hurtz's murders at all.

Given the absence of any actual linkage to the charged offenses, or any other evidence supporting an inference that the killings allegedly described by Hurtz were those of Cynthia and James Bell, Maples' testimony simply did not tend to show appellant's innocence. In view of the total lack of identifying information linking the alleged uncharged offense and the charged crimes, the evidence was insufficient to raise a reasonable doubt. The trial court's ruling was an appropriate exercise of its discretion under section 352. (*Davis, supra,* 10 Cal.4th at p. 502; *Pride, supra,* 3 Cal.4th at p. 238; *Clark, supra,* 3 Cal.4th at pp. 132-133; *Von Villas, supra,* 10 Cal.App.4th at pp. 266, 267.)[17]

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[17] At any rate, no possible prejudice could have occurred to appellant as a result of the exclusion of Maple's testimony. As seen, the trial court had already permitted appellant to introduce the very similar testimony of both Harmina Ross and Eliane West regarding Hurtz's alleged confessions of shooting two unidentified people at close range while the victims were sitting in a parked car near Vacaville. Maple's testimony to similar effect was merely cumulative.

## IX. EXCLUSION OF IMPEACHMENT EVIDENCE AGAINST NEUNDORF

Appellant next contends the trial court erred in refusing to allow him to impeach the stipulated testimony of his own defense witness Debra Neundorf by means of alleged prior inconsistent statements and statements against penal interest. Although we believe the trial court erred in its analysis of the question whether Neundorf's alleged out-of-court statements were made against her penal interest, we conclude that any possible error in denying their admission was not prejudicial.

### *PROCEDURAL BACKGROUND*

Debra Neundorf was called as a defense witness at both of appellant's prior trials. The defense was unable to call her in person as a witness at this trial because she was declared unavailable, having invoked her Fifth Amendment rights due to an arrest prior to trial. The parties therefore stipulated that her testimony from the second trial could be read into evidence. Pursuant to this stipulation, Neundorf's direct, cross, redirect and recross examinations from the prior trial were all read into the record. In that testimony, Neundorf testified that although she had previously dated Borelli, she was not dating him in October 1992; she never sold drugs to Cynthia Bell on Borelli's behalf; she never heard Borelli make threats against the Bells; Borelli never told her he was responsible for the Bells' murders or that he had the murder weapon; Borelli had never threatened her to dissuade her from testifying; and she was not afraid of Borelli. Appellant also questioned Neundorf on whether she had told defense investigator McClellan she was dating Borelli in October 1992.

Several days after Neundorf's previous trial testimony was read into the record, defense counsel called one Robert Morse to impeach Neundorf with new testimony that while recently in jail custody, she told Morse she had been untruthful in her prior testimony, she was very afraid of Borelli, and Borelli had told her he had the murder weapon. The prosecutor objected on the grounds Morse's testimony about Neundorf's alleged recent statements was hearsay offered for proof of the facts asserted; Neundorf was unavailable to be cross-examined about her conversation with Morse; and, because

the recent statements to Morse were made long after Neundorf's earlier trial testimony, she necessarily could not have been examined at that time so as to give her an opportunity to explain or deny her alleged subsequent statements. The trial court announced it would sustain the objection unless the defense could establish some legal right to present the new testimony.[18]

At a further hearing on the matter the next day, defense counsel argued Morse's testimony should be admitted on two grounds: (1) because during her previously transcribed testimony at the earlier trial Neundorf was cross-examined on similar statements concerning Borelli she allegedly made to a different defense investigator, the defense had already satisfied any confrontation requirements for the admission of her subsequent statements to Morse as prior inconsistent statements; and (2) Neundorf's

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[18] The following colloquy took place: "MR. KEALY [the prosecutor]: She's not available for cross-examination on these. The Court has declared her unavailable as a witness. I don't know whether she's going to come in and say I never talked to Mr. Morse about this. She's never been asked, did you tell Mr. Morse these things.

"THE COURT: Okay. I'm going to sustain the objection subject to if you can find me some law. But my feeling is we declared her to be unavailable. Now, she's testified by way of stipulation from her prior trial, and I think you're stuck with that. If you have some law that says otherwise, give it to me. We'll address it . . . .

"MR. KEALY: Your Honor, if I may, just because counsel has some case—

"MS. VOSS [defense counsel]: I don't understand the grounds for sustaining it. It's impeachment. Just because she's unavailable—she wasn't unavailable when this, uh, conversation took place. Um, she said it, and she was cross-examined as to these matters.

"MR. KEALY: There's been no testimony cross-examined as to anything she told Mr. Morse. We read her testimony in a couple weeks ago. Apparently, if I'm right, this happened with Mr. Morse within the last week?

"THE WITNESS [Morse]: Yes.

"MR. KEALY: The last couple of days?

"THE WITNESS: Last few days. But she was cross-examined on these matters, and she said something different. This is impeachment.

"THE COURT: No, that wouldn't be fair. In other words, you read in the testimony and then you go investigate, get something different. She's not around, and how can the other side, whether it was one way or the other, . . . confront the witness? That's the real problem."

alleged statements to Morse that she had been untruthful in her trial testimony were separately admissible as declarations against penal interest. The prosecutor responded that Neundorf had only been cross-examined about her earlier alleged statements to defense investigator McClellan, and had not had the opportunity to be confronted with her alleged statements to Morse. The trial court noted that "the real question" was the "fundamental fairness" of permitting one side to stipulate to the previous testimony of a witness, and then contradict that testimony with hearsay statements made after the fact while the witness was unavailable to testify.

The trial court ultimately sustained the objection, concluding that the prior inconsistent statement exception to the hearsay rule "applies only when the person whose statement is being used is a witness and has an opportunity to explain or to deny the statement." The court also noted that the hearsay statements sought to be admitted were made subsequent to her testimony, and were therefore not "prior" inconsistent statements. With respect to the question of whether they were admissible as against Neundorf's penal interest, the trial court found that Neundorf's alleged admission that she was "untruthful" in her previous trial testimony lacked any evidentiary value because it could not be ascertained whether or not the subject as to which she allegedly stated she had not told the truth constituted a "material fact."[19]

***APPLICABLE LEGAL PRINCIPLES***

The hearsay rule bars admission of any "evidence of a statement that was made other than by a witness while testifying at the hearing," when "offered to prove the truth of the matter stated." (Evid. Code, § 1200.) One of the specific exceptions to the hearsay rule is set out in Evidence Code section 1230 for statements "so far contrary" to the

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[19] The trial court stated: "Now she [Neundorf] makes a statement, according to Mr. Morse that he overheard, that ['] when I testified I wasn't telling the truth.['] . . . [¶] I don't know if that would be to a material fact, to every fact, or to no fact, or to the way she spelled her name when she was asked how to spell her last name. And so I don't know what evidentiary value that has."

declarant's personal interests "that a reasonable [person] in his [or her] position would not have made the statement unless he [or she] believed it to be true."[20] "A party who maintains that an out-of-court statement is admissible under this exception as a declaration against *penal* interest must show that the declarant is unavailable, that the declaration was against the declarant's penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character. [Citation.] To determine whether the declaration passes the required threshold of trustworthiness, a trial court 'may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.] On appeal, the trial court's determination on this issue is reviewed for abuse of discretion." (*People v. Cudjo* (1993) 6 Cal.4th 585, 607, original italics.)[21]

The hearsay statements sought to be introduced in this instance—Neundorf's assertions she had not told the truth during her previous trial testimony—are alleged by

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[20] Evidence Code section 1230 provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk or making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

[21] The other exception to the hearsay rule relevant to this case provides that statements by a witness "inconsistent with his [or her] testimony at the hearing" may be admitted if "offered in compliance with [Evidence Code] Section 770." (Evid. Code, § 1235.) Evidence Code section 770, subdivisions (a) and (b), in turn provides that, in order to admit "extrinsic evidence of a statement made by a witness that is inconsistent with any part of his [or her] testimony at the hearing," the witness must have been "so examined while testifying as to give him [or her] an opportunity to explain or deny the statement"; or else the witness must have "not been excused from giving further testimony in the action." Under this provision, the witness must be given a "realistic opportunity" to

appellant to have been against Neundorf's penal interest because they exposed her to a charge of perjury. Perjury is defined, in relevant part, as a declaration made "willfully and contrary to . . . oath" which "states as true any material matter which he or she knows to be false." (§ 118.) The materiality of the misstatement of fact is thus an element of the offense. The test for whether a misstatement of fact was "material" is whether it might have been used to affect the proceeding in or for which it was made, or whether it could have influenced the outcome of the proceedings. (*People v. Kobrin* (1995) 11 Cal.4th 416, 420, 427; *People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1575; *People v. Pierce* (1967) 66 Cal.2d 53, 61.)

***DISCUSSION***

Appellant places principal reliance on his argument that the hearsay statements of Neundorf to Morse were admissible as prior inconsistent statements.[22] Regardless of the

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explain or deny the alleged statement. (*People* v. *Garcia* (1990) 224 Cal.App.3d 297, 304.)

[22] Appellant essentially argues that because the prosecution had adequate opportunity to cross-examine Neundorf at the trial at which she gave her prior testimony, all of the testimony admitted pursuant to stipulation as prior testimony by an unavailable declarant under Evidence Code section 1291 must be treated as though Neundorf actually gave it at the present trial. Thus, appellant insists, even though her hearsay statement to Morse was actually made *after* she testified at the earlier trial, under Evidence Code section 1291 it should be considered as having been a *prior* inconsistent statement, "i.e., one made before the testimony was presented to the jury."

Acceding to appellant's argument that Neundorf was subject to cross-examination at the time she gave her testimony in the previous trial, this cannot obscure the fact her alleged statements to Morse took place long *after* that testimony. At the time of that earlier trial she *could not have been* given an opportunity to explain or deny the statements she allegedly made to Morse, simply because she had not made those statements yet. Because only the *transcript* of Neundorf's previous testimony was admitted at the trial now on appeal, she was not actually a witness "at the hearing," as required by Evidence Code section 1235. Accordingly Neundorf's alleged out-of-court statements to Morse were inadmissible under both sections 1235 and 770 of the Evidence Code. (*People* v. *Williams* (1976) 16 Cal.3d 663, 668-669; *People* v. *Hitchings* (1997) 59 Cal.App.4th 915, 920-922.)

merits of that argument, we have concluded the trial court erred in its analysis of appellant's alternative contention that Neundorf's statements to Morse should have been admitted under the exception for declarations against penal interest.

The trial court's stated reason for rejecting admission of Neundorf's alleged hearsay statements to Morse on this ground was that there was insufficient evidence the statements were material. According to the trial court, it was impossible to tell what evidentiary value Neundorf's statements had because it was unclear what she was referring to when she told Morse she did not tell the truth at the prior trial.

Because materiality is an element of the crime of perjury, the prosecution's failure to prove it is fatal to a perjury charge. What is at issue here, however, is not the merits of a perjury claim, but the application of a particular hearsay exception to the admission of proffered out-of-court statements. As in the case of other hearsay exceptions, the essence of the exception for statements against interest is the declarant's state of mind at the time of making the subject statements. Specifically, the rationale of the exception is based on the assumption that reasonable persons would not say deleterious things about themselves if they thought doing so would be harmful to their interests. In this context, then, the question is not whether Neundorf's statements would ultimately be adjudged "material" and perjurious as a matter of law, but whether her statements could possibly expose her to a *charge* of perjury and therefore be considered contrary to her penal interest.

In this case, Neundorf purportedly admitted that she lied under oath. Even if she may ultimately have been acquitted of a perjury charge, her potential exposure to arrest, pretrial detention and criminal prosecution by itself is clearly contrary to her pecuniary interest, and certainly subjects her to the *risk* of criminal liability as well. Assuming Neundorf did lie under oath and admit that she had done so, it strains credulity to conclude she did not see herself at risk because she somehow had enough knowledge of criminal law to realize both that materiality was an element of the crime of perjury, and that no court would find her lies "material."

We conclude that a reasonable person in Neundorf's position would have thought of her admission of lying under oath as being against her interests, and her out-of-court statements therefore qualified for admission under that exception to the hearsay rule. Even so, the trial court could still have excluded the statements if it determined they were not sufficiently reliable or trustworthy. (*People v. Cudjo, supra,* 6 Cal.4th at pp. 607-609; *People v. Frierson* (1991) 53 Cal.3d 730, 745.) Here, it does not appear the trial court made such a factual determination. We are loath to do so in the first instance on this appeal. Assuming the statements were sufficiently reliable, we therefore assume further that their exclusion was error.

That error, however, does not compel reversal; the question of prejudice remains. Assuming the trial court abused its discretion in barring the admission of this testimony, we may not reverse or set aside the judgment unless, in light of the entire record, we conclude the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) We cannot so conclude in this case.

The body of evidence against appellant was extensive and compelling, as we have set out in some detail. Numerous witnesses testified appellant not only threatened the lives of the victims on several occasions during the days just before the killings, but he also acknowledged committing the murders soon afterward. At least one of the murder bullets was identified as having been fired from appellant's gun. Several witnesses saw that gun in appellant's possession both immediately before and immediately after the murders. Other than Neundorf's hearsay statement to Morse that Borelli told her he had the murder weapon, there was *no other evidence* Borelli ever had possession or control of the gun used to kill the victims. Even accepting Borelli's alleged statement to Neundorf at face value, there is nothing to indicate *when* he might have had possession of the gun, or what the circumstances of his possession were. Indeed, whether or not Borelli said he had possession of the murder weapon, nothing in appellant's proffer suggests he ever admitted committing the murders.

Finally, Neundorf's reported statements to Morse had obvious indicia of unreliability. Not only were Neundorf's statements hearsay, but they were themselves chiefly concerned with alleged double hearsay statements by Borelli concerning his supposed possession of the murder weapon. Appellant's main reason for seeking admission of this double hearsay was as proof of the facts asserted. Thus, the reliability of *both* Neundorf and Borelli himself was placed in issue by Morse's proffered testimony. The testimony consists of jailhouse assertions that the declarant lied under oath during her previous testimony, which assertions the defense now seeks to admit as the truth without any chance for testing by cross-examination. Given her incarceration, Neundorf's motives for making the supposed admissions are certainly suspect. Under all these circumstances, there is only a remote chance a reasonable jury would have given substantial weight either to Neundorf's hearsay statements to Morse, or to the double hearsay statements of Borelli that Neundorf reportedly recounted. On this record, we conclude it is not reasonably probable that a result more favorable to appellant would have occurred in the absence of the trial court's error in articulating its reasons for denying admission of this evidence. (Cal. Const., art. VI, § 13; *Cudjo, supra,* 6 Cal.4th at pp. 612-614; *People v. Watson* (1956) 46 Cal.2d 818, 836.)[23]

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[23] In his reply brief, appellant for the first time argues that even if the statements allegedly made by Neundorf to Morse were inadmissible to prove their truth, they should have been admitted as impeachment evidence under Evidence Code section 1202. In the first place, appellant may not raise this argument for the first time in his reply brief. It is an established rule that points raised for the first time on appeal in a reply brief will ordinarily not be considered, in the absence of a showing of a good reason for the failure to present them earlier. To do so would deprive the respondent of an opportunity to counter the argument. Because appellant failed without good cause to raise this contention until his reply brief, we reject it. (*Reichardt* v. *Hoffman* (1997) 52 Cal.App.4th 754, 764-765; *Neighbours* v. *Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 616, pp. 647-648; 6 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Appeal, § 3250, pp. 4015-4017.) In any event, as already discussed, any error in failing to admit this evidence was harmless.

## X. ADMISSION OF ALLEGEDLY "COERCED" TESTIMONY

Appellant argues the trial court erred by permitting the testimony of prosecution witnesses Edgar Fry, Debbie Mathies and Shannon Nissen to be admitted because it was allegedly "coerced" by the law enforcement authorities. In support, appellant points to evidence that each of these witnesses originally told the police that appellant was not involved in the murders, and did not begin to cooperate "until their own personal interests required them to implicate him."

This argument fails. When appellant first raised it at trial, the trial court reviewed all the transcripts provided by defense counsel of the witnesses' prior testimony at appellant's earlier trials. The trial court noted that although the police informed the witnesses they could be charged as accessories in connection with this case, there was also evidence the police pressed them only to "tell the truth." The trial court concluded that although there were certainly evidentiary questions going to the credibility of these witnesses, there simply was insufficient evidence they had been coerced to bar their testimony from admission altogether.

A defendant has only a limited right to exclude the testimony of third parties on the ground that it was coerced. In any motion to exclude the testimony of a third party witness on grounds of coercion, the defendant bears the burden of proving that (a) the witness was improperly coerced; and (b) the reliability of the witness's testimony was actually impaired by the coercion. (*People v. Badgett* (1995) 10 Cal.4th 330, 346-350; *People v. Douglas* (1990) 50 Cal.3d 468, 500.) Although the claim that a witness's statement to the police was involuntary is subject to independent review on appeal, when faced with conflicting testimony in the record a reviewing court must accept the version of the event most favorable to the People. (*Badgett, supra,* 10 Cal.4th at pp. 350-352; *People v. Howard* (1988) 44 Cal.3d 375, 394.)

The record in this case fully supports the trial court's determination. The jury heard both the initial versions of the facts given to the police by Nissen, Mathies and Edgar Fry, and their subsequent statements inculpating appellant. All three witnesses

acknowledged they knew of their exposure to charges relating to drugs or complicity in the facts of this case, but specifically denied being subject to police threats, pressure or coercion to say anything other than the truth. There is nothing inherently coercive about confronting a suspect with the legal predicament he or she is in, or with an offer to release from custody or refrain from prosecuting the suspect in return for his or her cooperation with a police investigation. (*Badgett, supra,* 10 Cal.4th p. 355; *Douglas, supra,* 50 Cal.3d at p. 502, fn. 7.) Nothing more coercive than that occurred in this case. Ultimately, the question was one of credibility. The jury had before it all of the relevant evidence, and was in the best position to judge the credibility of these witnesses. There was no error.

## XI. RESTRICTION OF CROSS-EXAMINATION OF EDGAR FRY

Finally, appellant maintains the trial court improperly restricted his cross-examination of prosecution witness Edgar Fry, thereby allegedly denying appellant's constitutional rights to confront and cross-examine the witnesses against him. As in the case of his other arguments, appellant is wrong.

Appellant asserts the trial court prohibited him from "fully exploring" four "areas related to Edgar's credibility": (1) the threats allegedly made to him by the police; (2) problems in Edgar's relationship with appellant; (3) questions about Edgar's state of mind at the time of the murders, including his alleged depression, drinking and drug abuse problems; and (4) questions about whether Edgar obtained the factual information to which he testified from his own personal knowledge or from the police. According to appellant, the trial court improperly "restricted defense questioning in each of these areas. over defense objection," on the grounds "there had already been adequate testimony in those areas." Yet appellant does not provide *any specific examples* of questions he asserts were proper, but which were improperly disallowed by the trial court.

Under the Sixth Amendment of the United States Constitution, a defendant has the constitutional right to confront the witnesses against him and to cross-examine his or her accusers. Nevertheless, a trial court retains broad discretion over the conduct of trial. Included within this discretion is the power to impose reasonable limits on cross-

examination, in order to preclude repetitive, confusing, and unduly harassing interrogation. Thus, the Confrontation Clause simply guarantees an *opportunity* for effective cross-examination; it does not guarantee an opportunity to cross-examine in whatever way, and to whatever extent, the defense might wish. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679-680; *Davis v. Alaska* (1974) 415 U.S. 308, 315-316.) As long as the cross-examiner has the opportunity to place the witness in his or her proper light, and to put the weight of the witness's testimony and credibility to a reasonable test which allows the jury fairly to appraise it, the trial court may permissibly limit cross-examination to prevent undue harassment, expenditure of time, or confusion of the issues. (*Davis v. Alaska, supra,* 415 U.S. at p. 318; *Evans v. Lewis* (9th Cir. 1988) 855 F.2d 631, 634; *Steele v. Perez* (7th Cir. 1987) 827 F.2d 190, 193-194.)

Appellant's failure to cite *any* examples of questions he contends the trial court should have permitted him to ask Edgar Fry is fatal to his present argument. Contrary to appellant's vague assertion of improper restrictions on his cross-examination of Edgar, the record actually shows defense counsel was given ample opportunity to inquire into all of the subjects he cites in his brief on appeal. Thus, the trial court permitted defense counsel to question Edgar on his state of mind and usage of drugs and alcohol around the time of the murders. Under cross-examination, Edgar conceded he was depressed about his separation from his wife, and had been using drugs and alcohol. Defense counsel also questioned Edgar at great length about the supposed threats made to him by the police. Similarly, defense counsel cross-examined Edgar concerning his relationship with his brother with repeated questioning about whether they had a "good" relationship, how much time Edgar spent at appellant's house, whether the two "clicked," whether Edgar told the police he did not "give a 'F' about" appellant, and whether Edgar ever called appellant "a kick in the dirt as far as I'm concerned." Finally, defense counsel was permitted to question Edgar at length about whether the information to which he testified "originated" with the police as opposed to his own personal experience and observation.

On this record, appellant has utterly failed to establish that any unconstitutional restrictions were placed on his cross-examination of Edgar. To the contrary, the record demonstrates that, as to every subject now cited by appellant as an example of one on which his cross-examination of Edgar was unduly restricted, he actually asked many probing questions and was barely restricted in his cross-examination at all.

## XII. DISPOSITION

The judgment is affirmed.

McGuiness, P.J.

We concur:

Corrigan, J.

Parrilli, J.

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

On May 6, 2000, I served the foregoing document described as APPELLANT'S PETITION FOR REVIEW on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Court of Appeal
First Appellate District
Division Three
350 McAllister Street
San Francisco, CA 94103

Hon. Wm. C. Harrison
c/o Clerk, Superior Court
Solano County Hall of Justice
600 Union Avenue
Fairfield, CA 94533

Office of the District Attorney
600 Union Avenue
Fairfield, CA 94533

Attorney for Respondent:
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730 Harrison Street, #201
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SVSP
PO Box 1050-D7-124
Soledad, CA 93960-1050

X (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at San Francisco, California.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

_____

Janice M. Lagerlof

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IN THE DISTRICT COURT OF APPEAL

IN AND FOR THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

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THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
JOHN FRANCIS FRY,
Defendant and Appellant.

No. _____

--o0o--

REPORTER'S TRANSCRIPT ON APPEAL

FROM THE SUPERIOR COURT OF SOLANO COUNTY

STATE OF CALIFORNIA

HONORABLE WILLIAM C. HARRISON, PRESIDING

--o0o--

VOLUME XIII

PAGES 4101 THROUGH 4400

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ALISON L. GABODA, CSR NO. 7858
LAURA M. FORSTER, CSR NO. 8832
Certified Shorthand Reporters

IN THE DISTRICT COURT OF APPEAL

IN AND FOR THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

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|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff and Respondent,<br>vs.<br>JOHN FRANCIS FRY,<br>Defendant and Appellant. | No. _____ |

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REPORTER'S TRANSCRIPT ON APPEAL

FROM THE SUPERIOR COURT OF SOLANO COUNTY

STATE OF CALIFORNIA

HONORABLE WILLIAM C. HARRISON, PRESIDING

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going to get together to put it off on the defendant?

A No, it was just Arleen, Ryan, Shannon.

Q Didn't mention that a Debbie Mathies was part of this to put it off on the defendant, did he?

A No.

MR. KEALY: I have no further questions. Thank you very much.

MS. VOSS: Nothing further.

THE COURT: All right. You may step down.

THE WITNESS: Okay.

THE COURT: All right. Next witness on behalf of the defense.

MS. VOSS: Pam Maples.

MR. KEALY: I'm sorry --

MS. VOSS: Pam Maples.

PAMELA MARIE MAPLES

called as a witness on behalf of the Defense, being duly sworn to tell the truth, the whole truth, and nothing but the truth testified as follows:

THE WITNESS: Yes.

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Pamela Marie Maples, M-a-p-l-e-s.

THE COURT: All right. Ms. Maples, they have some questions of you.

May Voss, you may proceed.

MS. VOSS: Thank you.

DIRECT EXAMINATION

BY MS. VOSS:

Q Ms. Maples, do you know anybody by the name of John Fry?

A No, ma'am.

Q Do you know somebody by the name of Tony Hurtz?

A Yes.

Q How do you know Tony Hurtz?

A He's my cousin.

Q And, uh, at some point did you hear him discuss any homicides?

A Yes.

Q And when was that?

A It was in April of '94.

Q And, uh, who was, uh -- where did this take place?

A In Vallejo at my sister Tammy Terrazas' (ph) house.

Q Were you involved in the conversation, or did you just overhear it?

A Just overheard it.

Q And what did you hear Mr. Hurtz say in regards to the homicide?

MR. KEALY: Objection, hearsay, relevance.

MS. VOSS: I'm making --

MR. KEALY: No foundation.

THE COURT: Sustained.

MS. VOSS: I'd gladly make an offer of proof, your Honor.

THE COURT: We'll have to have the jury step outside. Why don't we take our recess now for the jurors. Hopefully you can return at 20 to 3:00, and we'll take care of our matters. Remember the admonition.

(Jurors leave)

THE COURT: All right. The jurors have left the courtroom. We're present with the defendant and counsel, and the offer of proof as to Ms. Maples?

MS. VOSS: Ms. Maples overheard Mr. Fry -- Mr. Hurtz say that he was the one who killed a man and woman in a car in Vacaville is my understanding.

THE WITNESS: Yes.

MS. VOSS: And that, uh, after he shot them, that he was full of blood, and that he, uh, put mud on himself or dirt on himself to cover up the mud -- I mean, to cover up the blood basically.

THE COURT: Mr. Kealy?

CROSS-EXAMINATION

BY MR. KEALY:

Q When did this conversation take place?

A April of '94.

Q Who other than yourself was present?

A My sister Tammy, myself, my cousin, and a guy named Steve.

Q Your cousin, you, Mr. Hurtz?

A Uh-huh.

Q Do you know who Steve is?

A No, sir.

Q And what part of the conversation did you overhear? Were you there for the whole conversation?

A No, I was in and out of the room when they were talking.

Q Well, what part -- was the conversation already underway about murders --

A Yes.

Q -- when you came in?

A Uh-huh.

Q Yes or no. We need a yes or no.

A Yes.

Q So you don't know how long they had been discussing, um, you know, whatever context -- what you heard? You don't know how that arose, do you?

A Huh-uh.

Q Yes or no, please.

A No.

Q And you say you were in and out. Did you stay for the whole conversation?

A No.

Q So you heard snippets of a conversation, correct?

A Yes.

Q How long were you in the room present -- well, actually when you come into the room, did you actually sit down and join the conversation?

A No, I was just in and out of the room. I just listened to bits and pieces of it.

Q So you don't know what was said before you were in the room, then you went out, when you came back in, correct?

A Uh-huh.

Q Again, yes or no.

A Yes.

Q And you don't know, I mean, whether this was a serious discussion or not, correct?

A Yes.

Q You do?

A No, I don't.

Q You don't know. I mean if, um, he had said, you know, I'm making a story or anything of the sort, correct?

A I don't know.

MR. KEALY: Nothing further.

THE COURT: Ms. Voss?

REDIRECT EXAMINATION

BY MS. VOSS:

Q Uh, when you -- you did hear Mr. Hurtz say that he had killed two people?

A Yes.

Q Did he describe whether they were male or female?

A He said male and female.

Q Did he say who he shot first?

A Yes.

Q Who did he say he shot first?

A The girl.

Q Did he say where he shot her?

A In the head.

Q What did he say he did next?

A Then he reached over and shot the guy.

Q And did he say what town they were in?

A No.

Q Did he say -- describe the area in any way?

A Um, he just said it was in a parking place.

Q A parking area?

A Yeah. Yes.

Q And did he say what he did after the homicides?

A Yes, he said he -- he was full of blood after the shooting, and he ran through a field, threw mud up on himself, and then went to make the phone call for somebody to pick him up.

MS. VOSS: Thank you. I have nothing further.

MR. KEALY: Yes, please, if I may?

THE COURT: You may.

RECROSS EXAMINATION

BY MR. KEALY:

Q When did Mr. Hurtz say that this murder had taken place?

A I didn't hear that.

Q So you don't know whether he was talking about something the week prior, two weeks prior, two months prior, two years prior, ten years ago?

A Yes.

Q Did he say where this murder took place, in what state?

A No.

Q It could have been in California, Arizona, New York, anyplace, correct?

A Yes.

Q Did, um, he say what day of the week it was?

A No.

Q Did he say who was with him?

A No.

Q And had you ever heard Mr. Hurtz discussing other criminal acts of his before?

A No.

Q You never heard him discuss other instances of murders?

A No.

Q So you don't know what he was talking about on this occasion, do you?

A No.

MS. VOSS: Your Honor, I'm going to object to this.

MR. KEALY: I have no further questions.

THE COURT: Okay. Ms. Voss, any further questions?

MS. VOSS: No, not for the purposes of this hearing.

THE COURT: Then I don't believe a sufficient foundation has been laid to allow this witness to testify as to alleged statements of Mr. Hurtz to be attributed to the incidents with which our trial is concerned without more, so --

MS. VOSS: Well, maybe I could ask a couple more questions. I don't know -- I don't understand the Court's ruling then.

THE COURT: You asked for a 402 hearing, and I made a ruling. All I'm doing is saying, with what I've heard, I would not allow this witness to testify as to what she heard to attempt to tie it into the facts with which our case is concerned.

FURTHER REDIRECT EXAMINATION

BY MS. VOSS:

Q Did he say whether the -- where the people were? Like were they in or out of a car?

A They were in the car.

Q Did he describe the car? Did he say whether --

THE COURT: You can't lead her. If you want to testify --

BY MS. VOSS:

Q A station wagon or --

A I can't say -- I mean, I don't know.

Q All right. Um, did he say anything else that would identify, uh, any other details about the homicide?

A Not that I can think of.

Q Uh, is Mr. Hurtz, um -- did he -- has he lived in this area, uh, all his life?

A I don't know, 'cause I wasn't raised with him.

Q Okay. In the last few years do you know where he's lived?

A In Sacramento and Fairfield.

MS. VOSS: Thank you. I have nothing further.
BY MR. KEALY:
Q You don't keep track of Mr. Hurtz's coming and going, do you?
A No.
Q I mean, two and-a-half years ago, you don't know where he was, do you?
A I believe he lived in Sacramento for a little while, then moved to Fairfield.
Q But I mean, he could go anywhere, you know, for any period of time and you won't know, correct?
A No.
MR. KEALY: That's all I have. Thank you.
THE COURT: All right. Then I'll sustained the objection to --
MS. VOSS: Your Honor --
THE COURT: -- lack of foundation to allow testimony as to alleged statements of Mr. Hurtz.
MS. VOSS: Well, your Honor, I would argue that the, um -- here we have enough detail to identify these murders, and plus it would be taken in with other murders. The jury should be allowed to decide what weight is given. We have a man and a woman who are killed in a car. The woman is shot in the head. Uh, it's done in a parking area. And, uh, there's certainly not a lot of homicides like that that go on. I would argue that this -- there is certainly sufficient detail to allow this in, and it's certainly a direct admission

by Mr. Hurtz that he was involved in these homicides.

MR. KEALY: No, your Honor, I mean, there's -- first of all, there's been absolutely no showing that whatever statement was made related in any way to this. To say this is a unique homicide, certainly is not. We cannot pin it down in any period of time in the past five, ten, fifteen years. I mean, she doesn't know.

THE COURT: Okay. I'm going to sustain the objection. You can always recall the witness. You have tomorrow off. I don't know what you can gather, but my feeling is today I'm not going to allow this witness to testify. You can give me authorities too with what was stated today whether or not you have a law that supports your position but there's not been a sufficient showing that this testimony ties in with the facts of our case.

All right. Do you have another witness?

MS. VOSS: Yes, I do.

THE COURT: All right. You may step down. And do counsel need five minutes?

MR. KEALY: If I could. Do we know who the witness is, if I need to get a book?

MS. VOSS: Harmina Ross. Maybe we should do the transcript right now.

THE COURT: We can do the transcript of Mr. Radossevich.

Okay. Get that ready, and get your reader here, and we'll stand in recess until a quarter to 3:00.

(Recess taken)

RESPONSE REQUESTED

ORIGINAL

No. 06-5247

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IN THE SUPREME COURT OF THE UNITED STATES

**JOHN FRANCIS FRY,**

*Petitioner,*

**v.**

**CHERYL K. PLILER, Warden,**

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is the exclusion of reliable evidence of third party culpability subject to harmless error analysis?

2. Should this case be remanded to the Ninth Circuit for reconsideration in light of *Holmes* v. *South Carolina*, __ U.S. __, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), and *House* v. *Bell*, __ U.S. __, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006)?

3. Where constitutional error has not been analyzed for harmlessness on direct review, does *Chapman* v. *California*, 386 U.S. 18 (1967) or *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993) apply in federal habeas corpus proceedings? Who bears the burden of persuasion on the issue of prejudice?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 06-5247

**JOHN FRANCIS FRY,**

*Petitioner,*

**v.**

**CHERYL K. PLILER, Warden,**

*Respondent.*

**STATEMENT OF THE CASE**

Petitioner John Francis Fry was convicted of the first degree murders of Cynthia and James Bell, and was sentenced to life in prison without the possibility of parole. The case against petitioner included ballistics evidence linking his pistol to the murders, his prior threats to kill Cynthia Bell, his truck being seen at the crime scene, and his flight to avoid arrest. Several witnesses also testified that after the killings petitioner returned home covered with blood, and that he admitted shooting the victims.

At trial, petitioner contended that another man, Anthony Hurtz, had confessed to committing the crimes. Petitioner introduced evidence of Hurtz's confessions through seven witnesses. Hurtz testified and denied any involvement in the murders. Testimony from an eighth witness, Pamela

Maples, who also reportedly overheard Hurtz confess, was excluded on foundational grounds. On appeal, petitioner argued that the exclusion of Maples's testimony was erroneous. His convictions were affirmed by the California Court of Appeal. It found that the exclusion of Maples's testimony did not violate state law, and that "no possible prejudice" to petitioner resulted because "very similar testimony" presented by the other witnesses made Maples's testimony "merely cumulative." Pet. App. 131a. The state opinion does not refer to the standard for harmless error established in *Chapman* v. *California*, 386 U.S. 18 (1967).

On August 15, 2001, petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the Eastern District of California. The District Court denied the petition in an unpublished order. The District Court adopted a magistrate judge's finding that, although the exclusion of Maples's testimony violated petitioner's constitutional rights and was an unreasonable application of *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), the exclusion was harmless. It applied the "substantial and injurious effect or influence" standard articulated in *Brecht* v. *Abrahamson*, 507 U.S. 619, 623 (1993). Pet. App. at 54a. The District Court reasoned that the jury had heard testimony from many other witnesses regarding Hurtz's purportedly self-confessed involvement in the killings, and that the exclusion of Maples's testimony to the same effect did not have a substantial and injurious

effect on the verdict. Pet. App. at 54a-55a.

The Ninth Circuit affirmed the District Court in an unpublished 2-1 decision. The Ninth Circuit concluded that although the state court had erroneously excluded reliable evidence of a third party's confession to the crime, the error was harmless under *Brecht*. Pet. App. 2a-3a. In a dissent, Judge Rawlinson concluded that the exclusion of Maples's testimony was prejudicial under *Brecht*. Pet. App. 4a-5a. A petition for rehearing en banc was denied. Pet. App. 6a.

**REASONS FOR DENYING PETITION**

Certiorari should be denied because the petition seeks review of the circuit court's application of a settled rule of law to petitioner's case. The petition suggests no basis to conclude that the rule is the subject of an important dispute among the nation's courts. Moreover, this is not an appropriate vehicle for reaching the issues presented by the petition.

1. Petitioner suggests that the exclusion of "reliable" evidence of third party culpability is structural error. That argument is incorrect. This Court recently reconfirmed the limited class of cases which are not subject to harmless error analysis:

> We have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, "'most constitutional errors can be harmless.' " *Neder* v. *United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting *Arizona* v. *Fulminante*, 499

> U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). "'[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.' " 527 U.S., at 8, 119 S.Ct. 1827 (quoting *Rose* v. *Clark*, 478 U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)). Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal. In such cases, the error "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, *supra*, at 9, 119 S.Ct. 1827 (emphasis omitted).

*Washington* v. *Recuenco*, __ U.S. __, 126 S.Ct. 2546, 2551 (June 26, 2006)(footnote omitted). An "erroneous ruling of the trial court [excluding defense evidence] is subject to harmless error analysis." *Crane* v. *Kentucky*, 476 U.S. 683, 691 (1986). Even where a defendant's constitutional rights are violated due to exclusion of "crucial" defense impeachment evidence, reversal is not compelled, and prejudice must be demonstrated. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 683-84 (1986). Thus, the Court has clearly established that erroneous exclusion of evidence may be found harmless, and petitioner's suggestion to the contrary must be rejected.

2. This Court's recent decisions addressing third party culpability evidence do not justify the granting of certiorari. Petitioner suggests that, in light of *Holmes* v. *South Carolina*, __ U.S. __, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), and *House* v. *Bell*, __ U.S. __, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006), this Court should grant the writ of certiorari, vacate the judgment, and remand to the Ninth

Circuit. Pet. at 21. This Court has held that a GVR order is "potentially appropriate" where "intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration . . . ." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996)(per curiam). Neither *Holmes* nor *House*, however, establish principles which create the conditions necessitating a remand to the Ninth Circuit in petitioner's case.

In *Holmes*, this Court reaffirmed that a state may exclude third party culpability evidence under the "widely accepted" evidentiary rules which focus on probative value versus "other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." 126 S.Ct. at 1732-33. (Petitioner's evidence was excluded under such a rule. See Pet. App. 131a (citing Cal. Evid. Code §352).) *Holmes* does not imply that the exclusion of reliable third party evidence cannot "be treated as harmless" as claimed by petitioner. Pet. at 14. Rather, *Holmes* rejected the rule followed in South Carolina that arbitrarily excluded third party culpability evidence regardless of its probative value, or of the possible adverse effect of admitting the defense evidence, so long as there was strong evidence of guilt. 126 S.Ct. at 1734-35. *Holmes* does not imply that all reliable

third party culpability evidence must be admitted much less that its erroneous exclusion can never be harmless. A defendant does not have a right to present even "crucial, relevant evidence" where there is a "valid state justification" for its exclusion. *Montana* v. *Egelhoff*, 518 U.S. 37, 53 (1996). Indeed, this Court has expressly recognized that "relevant evidence can be curtailed if there is a good reason for doing that," such as evidentiary rules like California's Evidence Code section 352 that weigh the probative value against "'confusion of the issues, or potential to mislead the jury.'" *Clark* v. *Arizona*, __ U.S. __, 126 S.Ct. 2709, 2731-32, 165 L.Ed.2d 842 (2006), quoting *Holmes*.

In *House*, the Court discussed the weight to be given to the testimony of two witnesses who testified to hearing the confessions of a third party to the crime at issue. This Court distinguished the testimony of these lay witnesses from the "sort of eleventh-hour affidavit vouching for a defendant and incriminating a conveniently absent suspect" which are "'not uncommon' in capital cases." 126 S.Ct. at 2085 quoting *Herrera* v. *Collins*, 506 U.S. 390, 423 (1993)(O'Connor, J., conc.). *House* involved "an alleged spontaneous statement recounted by two eyewitnesses with no evident motive to lie. For this reason, it [had] more probative value than, for example, incriminating testimony from inmates, suspects, or

friends or relations of the accused." 126 S.Ct. at 2085. Petitioner suggests that *House's* statement about the relative value of an unbiased witness's testimony justifies a GVR order. Pet. at 18, 20-21. Not so.

Maples's lack of bias was a given in the lower courts. The District Court characterized Maples as "the only third party culpability witness who had no apparent bias." Pet. App. 52a. The dissenting panel member characterized Maples as the "only unbiased witness presented by either side." Pet. App. 4a. Nonetheless, both the District Court and Ninth Circuit found that since the jury had heard seven other witnesses provide testimony similar to Maples's proffered testimony, the error was harmless. There is no reason to believe that the Ninth Circuit would reconsider that decision based on the cited passage from *House*. That case, like *Holmes*, does not address harmless error analysis.

3. Petitioner mistakenly suggests that a significant split exists in the circuits regarding the applicable harmless error test on federal habeas corpus where a constitutional error has not been found harmless beyond a reasonable doubt on direct review. Pet. at p. 15. Petitioner acknowledges that the Third, Fourth, Fifth, Seventh, Tenth and Eleventh Circuits have held that "*Brecht*, rather than *Chapman*, enunciates the appropriate standard for determining whether a constitutional error was harmless in a federal habeas challenge to a state conviction or sentence regardless of the standard employed in

the state courts." Pet. at 15, quoting *Hassine* v. *Zimmerman*, 160 F.3d 941, 950 (3rd Cir. 1998). Petitioner maintains that the Second and Ninth Circuits have expressed doubts regarding the proper standard to apply, while the Eighth Circuit has indicated that the *Chapman* test is to be employed. Pet. at 15, citing *Santa-Madera* v. *United States*, 260 F.3d 133, 140 (2nd Cir. 2001); *Allen* v. *Woodford*, 366 F.3d 823, 857, n.6 (9th Cir. 2004); and *Barrett* v. *Acevedo*, 169 F.3d 1155, 1164 (8th Cir. 1999).

There is not a substantial conflict in the circuits which justifies a writ of certiorari. In 2005, the Second Circuit acknowledged that, while it had "previously reserved the question" regarding the appropriate standard of review in a case where *Chapman* was not applied in the state court, "the Supreme Court, in dicta in *Penry* v. *Johnson*, 532 U.S. 782, 795-96 (2001) has applied the standard elaborated in *Brecht* ...." Likewise, the Ninth Circuit, in *Bains* v. *Cambra*, 204 F.3d 964, 976 (9th Cir. 2000), announced that it would "join the vast majority of our sister circuits" and apply *Brecht*, and not *Chapman*, in all habeas cases.

The Eighth Circuit alone continues to assert that the *Chapman* standard is ever appropriate on habeas corpus. But even that court now acknowledges *Chapman* is "generally inapplicable" to collateral review, notwithstanding its use of *Chapman* instead of *Brecht* if the state court has not conducted

harmless error review. *Juarez* v. *Minnesota*, 217 F.3d 1014, 1017 (8th Cir. 2000).

Significantly, the Eighth Circuit has not revisited the issue since *Penry*, which applied *Brecht* in a case where the state court found no error. Any conflict is minor, as the Eighth Circuit may well reverse itself in light of *Penry*. Since there is no pressing need to resolve this issue of harmless error review, a decision by the Court at this juncture appears unnecessary.

4. This case involves a fact-specific inquiry. In the Ninth Circuit, petitioner conceded that "consideration of the issues in this case requires the consideration of many, many facts." App. Opening. Br., 04-16876, at 37. The petition for certiorari characterizes the case as "unprecedented." Pet. at 12. Further review of this fact-bound case is not warranted. Moreover, the decision is unpublished, non-precedential, and hence unlikely to affect the development of the law.

The petition suggests this Court should address the issue of who bears the burden of persuasion on the question of prejudice. Pet. at 24. Petitioner concedes that this issue "is not addressed in the Ninth Circuit's opinion" below. Pet. at 25. Since that issue was not decided by the Court of Appeals, certiorari is not appropriate. See *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001)(per curiam)("We ordinarily do not decide in the first instance issues not decided below")(internal quotation marks omitted).

**CONCLUSION**

For the reasons stated, the petition for writ of certiorari should be denied.

Dated: October 26, 2006

Respectfully submitted,

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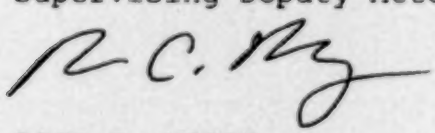

ROSS C. MOODY
Deputy Attorney General
Counsel of Record

*Counsel for Respondent*

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No. 06-5247

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IN THE

SUPREME COURT OF THE UNITED STATES

---

JOHN FRANCIS FRY, *Petitioner*

*v.*

CHERYL K. PLILER, *Respondent*

---

***CERTIFICATE OF SERVICE BY MAIL***

I, ROSS C. MOODY, a member of the Bar of this Court, hereby certify that on this October 26, 2006, one copy of the **Brief In Opposition To Petition For Writ of Certiorari** in the above-entitled case was mailed, first class postage prepaid to

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I further certify that all parties required to be served have been served.

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# In the Supreme Court of the United States

No. 06-5247

**JOHN F. FRY**, PETITIONER

*v.*

**CHERYL K. PLILER, Warden,** RESPONDENT

---

***ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT***

---

## PETITIONER'S REPLY BRIEF

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## INTRODUCTION

The truth-finding process was distorted beyond repair in the State of California's prosecution of John Francis Fry. Mr. Fry was convicted by jury in a trial during which evidence of third party guilt, which the State now concedes to be reliable, was excluded. Although error of this ilk "creates a grave risk of the wrongful conviction of the innocent[,]" Imwinkelried & Garland, *Exculpatory Evidence*, § 15-5 (3d ed. 2004), and although Mr. Fry has challenged his conviction on the basis of this error at every available step in post-conviction proceedings, the result of the irreparably distorted truth-finding process has yet to be rectified.

The State of California tried Mr. Fry three times for a double murder. The first two trials ended with evenly-split, deadlocked juries. In the third trial, the presiding judge unconstitutionally excluded what is now conceded to be the testimony of "the only unbiased witness presented by either" the prosecution or the defense — a witness whose proffered testimony was that her cousin confessed to the crime for which Mr. Fry is now imprisoned. Despite this egregious violation of Mr. Fry's right to present his defense, the jury in Mr. Fry's third trial deliberated for five weeks, and once declared itself to be deadlocked 7-5, before convicting Mr. Fry.

At no time during direct review of Mr. Fry's conviction did the California appellate judiciary recognize the profound constitutional violation that had occurred. Accordingly, the state appellate judiciary did not endeavor to determine whether the constitutional error was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967).

In § 2254 proceedings, all federal judges who have considered the case have recognized that the exclusion of the reliable third party culpability evidence proffered by Mr. Fry was unconstitutional. However, the district court and the panel majority in the Ninth Circuit concluded that the error was harmless under the standard set forth in *Kotteakos v. United States*, 328 U.S. 750 (1946), and *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

Review on certiorari is warranted in this case to make explicit a point which is implicit in past decisions of this Court: The unconstitutional exclusion of evidence of third party guilt, which would conclusively establish the accused's innocence if believed, is an inherently indeterminate type of error, which undermines the truth-finding function of a trial, and which is simply not amenable to harmless-error review. Further, even if the type of constitutional error involved in this case is subject to harmless-error scrutiny, review on certiorari is warranted to resolve a circuit conflict as to whether the *Chapman* standard or the

*Kotteakos/Brecht* standard applies in a § 2254 proceeding in which no *Chapman* review was conducted during antecedent state post-conviction proceedings. Finally, in light of recent decisions of this Court, which were handed down after the Ninth Circuit's decision in this case, and which are germane to central issues herein, a GVR disposition may be appropriate.

## DISCUSSION

### I.

### A JURY'S GUILTY VERDICT IN A TRIAL IN WHICH RELIABLE EVIDENCE OF THIRD PARTY GUILT HAS BEEN UNCONSTITUTIONALLY EXCLUDED IS NOT AMENDABLE TO HARMLESS-ERROR REVIEW, WHEN THE EVIDENCE, IF CREDITED, WOULD CONCLUSIVELY ESTABLISH THE INNOCENCE OF THE ACCUSED.

The State Attorney General argues that certiorari ought not to be granted in this case because review is sought with respect to the Ninth Circuit's application of a settled rule of law, namely the harmless error rule. *See* Brief in Opposition at 3-4. However, as noted in Mr. Fry's petition, there is no precedent for application of the harmless error rule in the context in which it was applied in the instant case. Indeed, there is no precedent for treating a trial court's unconstitutional exclusion of indisputably reliable evidence of third party guilt as harmless.[1] The absence of

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[1] As the State Attorney General acknowledges at page 7 of the Brief in Opposition to Mr. Fry's Petition for a Writ of Certiorari, the reliability of the unconstitutionally

any precedent in this regard is unsurprising, as it simply makes no sense to characterize such outcome-influencing error as harmless. The exclusion from a trial of reliable evidence that someone other than the accused committed the charged offense is, *ipso facto*, harmful to the accused.

While this Court has never explicitly held that a trial court's unconstitutional exclusion of reliable evidence of third party guilt cannot be treated as harmless, such a conclusion is implicit in this Court's decisions in *Holmes v. South Carolina*, 547 U.S.___, 164 L.Ed.2d 503, 126 S.Ct. 1727 (2006), *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Washington v. Texas*, 388 U.S. 14 (1967).

This case presents an opportunity for this Court to state this rule explicitly. Such a rule is necessary in order to safeguard the primacy of the truth-finding function of criminal trials. *See Chambers v. Mississippi*, 410 U.S. at 295 (Denying the accused the opportunity to present exculpatory evidence "calls into question the ultimate 'integrity of the fact-finding process.'"); *Tehan v. United States*, 382 U.S. 406, 416 (1966) ("The basic purpose of a trial is the determination of truth...."); Strier, *Making Jury Trials More Truthful*, 30 U.C. Davis L. Rev. 95, 99 (1996) ("None of the trial's functions [is] more central to its legitimacy than the

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excluded evidence in this case is "a given...."

search for truth. For if the trial does not effectively develop the facts and comprehensively present them to the factfinder, trial justice is serendipitous.") (footnote omitted).

In the case at bar, it is now undisputed that reliable evidence of third party guilt was excluded from the trial which resulted in Mr. Fry's conviction and life sentence. In such a case, the State Attorney General's reliance on the general rule that harmless error analysis applies to a trial court's erroneous exclusion of defense evidence is misplaced. Mr. Fry has no quarrel with this general rule, and this Court has recognized this general rule. *Crane v. Kentucky*, 476 U.S. 683, 691 (1986). However, consideration of the purpose and scope of the harmless-error rule leads to the conclusion that the rule is inapposite when the criminal conviction under review occurred in a jury trial where the trial court undermined the jury's truth-finding function by excluding reliable third-party culpability evidence proffered by the defense.

"Harmless-error review looks ... to the basis on which 'the jury *actually rested* its verdict.'" *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis in the original) (quoting *Yates v. Evatt*, 500 U.S. 391, 404 (1991)).

> "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely

> unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered — no matter how inescapable the findings to support that verdict might be — would violate the jury-trial guarantee."

*Id* (emphasis in the original).[2]

In *Sullivan*, this Court held that error which consisted of a trial court's failure to give a proper reasonable doubt instruction to the jury was not amenable to harmless-error review, because the error necessarily precluded the jury from rendering a verdict of guilty beyond a reasonable doubt, thereby leaving "no *object* ... upon which harmless-error scrutiny [could] operate." *Id.* at 280 (emphasis in the original). In such a case, [a] reviewing court can only engage in pure speculation — its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judges the defendant guilty.'" *Id.* at 281 (quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986)).

Essentially the same situation obtains here: The trial court's error in failing to allow the jury to receive reliable evidence that someone other than Mr. Fry committed the homicide with which Mr. Fry was charged precluded the jury from

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[2] "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." *Id.* at 280.

determining where the truth lies in this case, i.e., reaching a meaningful verdict.[3] Similarly, in *Chambers v. Mississippi*, 410 U.S. 284, this Court's decision that a trial court's erroneous exclusion of reliable third-party-culpability evidence necessitated reversal, *id.* at 302-303, "rest[ed] on the ultimate impact" of the exclusion of the evidence. *Id.* at 298.[4] Thus, in the instant case, as in *Sullivan* and *Chambers*, constitutional error occurred which left no object, i.e., no verdict, upon which harmless-error scrutiny can operate. No reviewing court can do anything but speculate what result Mr. Fry's jury would have reached had the jury been presented with the proffered, reliable evidence that someone other than Mr. Fry committed the crime in question.

This Court has recently characterized errors as unamenable to harmless-error review where the errors "'necessarily render[ed] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence[,]'" *Washington v. Recuenco*, ___U.S.___, 165 L.Ed.2d 466, 474, 126

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[3] "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. at 19. Rules excluding proffered testimony of witnesses called by the defense have the "effect of suppressing the truth...." *Id.* at 20.

[4] As this Court explained in *Holmes v. South Carolina*, 164 L.Ed.2d 503, when a case is evaluated without regard to proffered exculpatory evidence, "no logical conclusion can be reached regarding the strength of" the exculpatory evidence. *Id.* at 513.

S.Ct. 2546, 2551 (2006) (quoting *Neder v. United States*, 527 U.S. 1, 9 (1999), and/or where the nature of the error is such that its assessment would involve "a speculative inquiry into what might have occurred in an alternate universe." *United States v. Gonzalez-Lopez*, ___U.S.___, 165 L.Ed.2d 409, 420, 126 S.Ct. 2557, 2565 (2006).[5]

The error in this case is error of this ilk. Just as the trials in *Washington v. Texas*, *Chambers v. Mississippi*, and *Holmes v. South Carolina* were rendered fundamentally unfair and unreliable by the exclusion of critical and/or reliable evidence of third party guilt, Mr. Fry's trial was compromised by an error which "calls into question the ultimate 'integrity of the fact-finding process.'" *Chambers v. Mississippi*, 410 U.S. at 295. And, because the jury in Mr. Fry's trial was not afforded the opportunity to evaluate the testimony of the witness who would have described her cousin's confession to the crime for which Mr. Fry is now imprisoned, the effect of this error cannot be characterized as anything other than inherently indeterminate. Thus, the erroneous exclusion of this evidence necessitates reversal.

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[5] *See* 5 LaFave, Israel & King, *Criminal Procedure*, § 27.6(d) (2d ed. 1999) ("Undoubtedly the characteristic of violations requiring automatic reversal most frequently mentioned by the Supreme Court is the 'inherently indeterminate' impact of the violations upon the outcome of the trial.").

Alternatively, even if the constitutional error in the instant case were deemed amenable to harmless error review, the error cannot be deemed harmless. Specific factors in this case compel this conclusion: It took the State three trials to convict Mr. Fry, with the first two trials ending in deadlock due to evenly divided juries. App. 4a, 45a. The jury in the third trial deliberated for an extraordinarily lengthy period — five weeks. App. 4a, 45a. At one point, the jury had declared itself deadlocked 7-5. App. 45a. In addition to the excluded exculpatory evidence, Mr. Fry adduced an abundance of evidence pointing to his innocence. App. 45a. Finally, the witness who was erroneously precluded from testifying "was the only unbiased witness presented by either side." App. 4a. Serious constitutional error under these circumstances cannot be deemed harmless under any measure.

II.

REVIEW ON CERTIORARI IS WARRANTED TO RESOLVE THE CIRCUIT CONFLICT CONCERNING THE APPLICABLE STANDARD OF HARMLESS-ERROR REVIEW IN § 2254 CASES WHERE NO *CHAPMAN* REVIEW HAS BEEN CONDUCTED IN THE STATE JUDICIARY.

The instant case is a § 2254 case in which lower court determinations concerning Mr. Fry's entitlement to relief have turned on application of

*Kotteakos/Brecht* rather than *Chapman*.[6] Indeed, the district court expressly stated that it could not rule out prejudice due to the constitutional error in this case. App. 54a. However, applying *Brecht*, that court concluded that the error did not have a substantial and injurious effect on the jury's verdict. App. 54a-55a.[7] Likewise, the panel majority in the Ninth Circuit applied *Brecht*, despite the fact that "the state appellate court failed to conduct a meaningful prejudice review." App. 3a.

In *Brecht*, this Court relied on "the State's interests in the finality of convictions" and concerns of "comity and federalism" to justify application of the *Kotteakos* harmless-error standard in federal habeas proceedings. *Brecht*, 507 U.S. at 631, 635. "[T]he *Brecht* majority apparently premised these justifications on an assumption that a finding of harmlessness by the state courts under the more stringent *Chapman* rule always will precede habeas corpus review of the harmlessness question...." 2 Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure*, § 31.1 n. 19 (5th ed. 2005). Because of this underlying premise, "the Eighth Circuit has limited *Brecht* to situations in which the state courts in fact

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[6] *Cf.*, *United States v. Dominguez Benitez*, 542 U.S. 74, 86-87 (2004) (Scalia, J., concurring in the judgment) (questioning whether application of one standard rather than the other makes any difference).

[7] As noted in Mr. Fry's petition, the district court improperly looked to Mr. Fry to shoulder the burden of making the showing of a substantial and injurious effect.

previously applied the *Chapman* rule." *Id.* (citing *Barrett v. Acevedo*, 169 F.3d 1155, 1164 (8th Cir.) (*en banc*), cert. denied, 528 U.S. 846 (1999); *Seiler v. Thalacker*, 101 F.3d 536, 539 (8th Cir. 1996), cert. denied, 520 U.S. 1175 (1997); *Fields v. Leapley*, 30 F.3d 986, 991 (8th Cir. 1994)). As the State Attorney General has observed, a number of circuits have concluded that *Brecht* applies, regardless of whether the state judiciary applied *Chapman* during the course of direct review. *See* Brief in Opposition at 7. In the Ninth Circuit, one panel majority adopted the rule that *Brecht* applies uniformly in all § 2254 cases, *Bains v. Cambra*, 204 F.3d 964, 977 (9th Cir.), cert. denied, 531 U.S. 1037 (2000), but another panel thereafter treated the question as still open. *Allen v. Woodford*, 395 F.3d 979, 1013 n. 6 (9th Cir. 2005). And, the Second Circuit has left the question open. *Lyons v. Johnson*, 99 F.3d 499, 503 (2d Cir. 1996).

Thus, the law on this issue is unsettled in the circuits. The State Attorney General's suggestion to the contrary is factually inaccurate. Under Rule 10(a) of the Rules of the Supreme Court of the United States, review on certiorari is warranted to resolve this conflict.

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## III.

## A GVR DISPOSITION MAY BE WARRANTED IN LIGHT OF THIS COURT'S RECENT DECISIONS IN *HOLMES* AND *HOUSE*.

As discussed in Mr. Fry's petition, this Court's recent decisions in *Holmes v. South Carolina*, 164 L.Ed.2d 503, and *House v. Bell*, 547 U.S.___, 165 L.Ed.2d 1, 126 S.Ct. 2064 (2006), involve decision-making with respect to issues which are pertinent in the instant case. In *Holmes*, this Court reversed a conviction, without any discussion of harmless error, where the conviction was tainted by the unconstitutional exclusion of important evidence of third party guilt, which, "if believed, [would have] strongly support[ed] a verdict of not guilty." 164 L.Ed.2d at 512. In *House*, this Court stressed the compelling nature of third-party confession evidence provided by unbiased witnesses. 165 L.Ed.2d at 30-31.

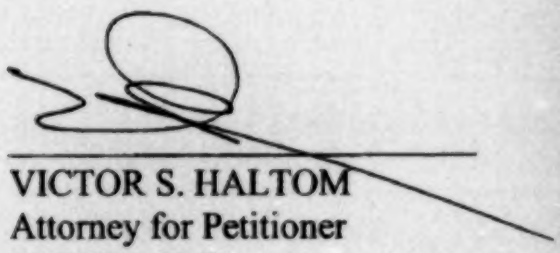
Thus, an implicit component of the *Holmes* decision appears to be that the erroneous exclusion of critical evidence of third party guilt is a type of error which is not amenable to harmless-error review. A GVR disposition would enable the Ninth Circuit to consider and apply this implicit principle in the instant case, which also involves the erroneous exclusion of critical evidence of third party guilt. Additionally, a GVR disposition would enable the Ninth Circuit to consider and apply the principle relied upon in *House*, that evidence of a third party

confession provided by a neutral witness has significant probative force. This principle is critically important in the instant case, as the constitutional error in Mr. Fry's trial involved the exclusion of the testimony of the only unbiased witness available to testify concerning a third party's confession to the crime for which Mr. Fry has been convicted.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



VICTOR S. HALTOM
Attorney for Petitioner
JOHN F. FRY

November 7, 2006

# In the Supreme Court of the United States

No. **06-5247**

**JOHN F. FRY**, PETITIONER

*v.*

**CHERYL K. PLILER, Warden,** RESPONDENT

---

***ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT***

---

## CERTIFICATE OF SERVICE OF PETITIONER'S REPLY BRIEF

---

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*428 J Street, Suite 350*
*Sacramento, CA 95814*
*(916) 444-8663*

## CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the above-entitled action; my business address is 428 J Street, Suite 350, Sacramento, California 95814.

On the date below, I served the following document(s), on all parties, as required by Rule 29 of the Rules of the Supreme Court of the United States:

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ROSS C. MOODY, Esq.
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e-mail: ross.moody@doj.ca.gov

I declare under penalty of perjury that the foregoing is true and correct.

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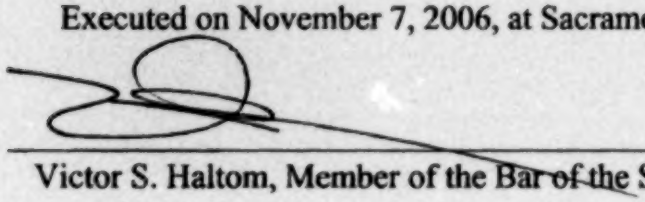

Victor S. Haltom, Member of the Bar of the Supreme Court of the United States

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November 7, 2006

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Enclosed herewith are an original plus 13 copies of a Petitioner's Reply Brief, in connection with the above-referenced case. Please file the original and 10 copies, and please endorse and return the three additional copies to my office in the enclosed return envelope.

I am also submitting for filing a certificate of service. In that regard, I am enclosing an original, plus three copies of said certificate. Please file the original and two copies and return an endorsed copy to my office in the enclosed return envelope.

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Best Regards,

Victor S. Haltom

VSH/srh

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No. 06-5247

# In The Supreme Court of the United States

JOHN F. FRY,

*Petitioner,*

v.

CHERYL K. PLILER, Warden,

*Respondent.*

**On A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## JOINT APPENDIX


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## A. Superior Court of California for Solano County

February 10, 1993 – Information filed

February 22, 1994 – First jury trial commenced

April 4, 1994 – Mistrial declared in first trial

August 22, 1994 – Second jury trial commenced

October 21, 1994 – Mistrial declared in second trial

February 21, 1995 – Third jury trial commenced

June 8, 1995 – Guilty verdict returned

August 30, 1995 – Notice of appeal filed

## B. State Post-Conviction Proceedings

March 30, 2000 – Unpublished Opinion of the California Court of Appeal, First Appellate District, Division Three

May 8, 2000 – Petition for review filed

July 12, 2000 – Summary denial by the California Supreme Court

## C. § 2254 Proceedings in the United States District Court, Eastern District of California

August 15, 2001 – Pro se § 2254 petition filed

June 24, 2002 – Amended petition filed

June 2, 2004 – Findings and Recommendations of the Magistrate Judge in the U.S. District Court, Eastern District of California

August 27, 2004 – Order and Judgment of the U.S. District Court, Eastern District of California

August 31, 2004 – Notice of Appeal

September 9, 2004 – Order granting certificate of appealability

**D. Appeal to the Ninth Circuit**

February 2, 2006 – Memorandum of the U.S. Court of Appeals, Ninth Circuit

April 25, 2006 – Order of the U.S. Court of Appeals, Ninth Circuit, denying petition for panel rehearing and rehearing en banc

**E. Supreme Court of the United States**

June 6, 2006 – Petition for certiorari

December 7, 2006 – Order granting leave to proceed *in forma pauperis*, and granting petition for writ of certiorari

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IN THE DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

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| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, | ) | No. ___ |
| vs. | ) | |
| JOHN FRANCIS FRY, Defendant and Appellant. | ) | |

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REPORTER'S TRANSCRIPT ON APPEAL
FROM THE SUPERIOR COURT OF SOLANO COUNTY
STATE OF CALIFORNIA
HONORABLE WILLIAM C. HARRISON, PRESIDING

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* * *

[4136] going to get together to put it off on the defendant?

A No, it was just Arleen, Ryan, Shannon.

Q Didn't mention that a Debbie Mathies was part of this to put it off on the defendant, did he?

A No.

MR. KEALY: I have no further questions. Thank you very much.

MS. VOSS: Nothing further.

THE COURT: All right. You may step down.

THE WITNESS: Okay.

THE COURT: All right. Next witness on behalf of the defense.

MS. VOSS: Pam Maples.

MR. KEALY: I'm sorry –

MS. VOSS: Pam Maples.

PAMELA MARIE MAPLES

called as a witness on behalf of the Defense, being duly sworn to tell the truth, the whole truth, and nothing but the truth testified as follows:

THE WITNESS: Yes.

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Pamela Marie Maples, M-a-p-l-e-s.

THE COURT: All right. Ms. Maples, they have some questions of you.

May [sic] Voss, you may proceed.

MS. VOSS: Thank you.

DIRECT EXAMINATION

[4137] BY MS. VOSS:

Q Ms. Maples, do you know anybody by the name of John Fry?

A No, ma'am.

Q Do you know somebody by the name of Tony Hurtz?

A Yes.

Q How do you know Tony Hurtz?

A He's my cousin.

Q And, uh, at some point did you hear him discuss any homicides?

A Yes.

Q And when was that?

A It was in April of '94.

Q And, uh, who was, uh – where did this take place?

A In Vallejo at my sister Tammy Terrazas' (ph) house.

Q Were you involved in the conversation, or did you just overhear it?

A Just overheard it.

Q And what did you hear Mr. Hurtz say in regards to the homicide?

MR. KEALY: Objection, hearsay, relevance.

MS. VOSS: I'm making –

MR. KEALY: No foundation.

THE COURT: Sustained.

MS. VOSS: I'd gladly make an offer of proof, your Honor.

[4138] THE COURT: We'll have to have the jury step outside. Why don't we take our recess now for the jurors. Hopefully you can return at 20 to 3:00, and we'll take care of our matters. Remember the admonition.

(Jurors leave)

THE COURT: All right. The jurors have left the courtroom. We're present with the defendant and counsel, and the offer of proof as to Ms. Maples?

MS. VOSS: Ms. Maples overheard Mr. Fry – Mr. Hurtz say that he was the one who killed a man and woman in a car in Vacaville is my understanding.

THE WITNESS: Yes.

MS. VOSS: And that, uh, after he shot them, that he was full of blood, and that he, uh, put mud on himself or dirt on himself to cover up the mud – I mean to cover up the blood basically.

THE COURT: Mr. Kealy?

CROSS-EXAMINATION

BY MR. KEALY:

Q When did this conversation take place?

A April of '94.

Q Who other than yourself was present?

A My sister Tammy, myself, my cousin, and a guy named Steve.

Q Your cousin, you, Mr. Hurtz?

A Uh-huh.

Q Do you know who Steve is?

A No, sir.

[4139] Q And what part of the conversation did you overhear? Were you there for the whole conversation?

A No, I was in and out of the room when they were talking.

Q Well, what part – was the conversation already underway about murders –

A Yes.

Q – when you came in?

A Uh-huh.

Q Yes or no. We need a yes or no.

A Yes.

Q So you don't know how long they had been discussing, um, you know, whatever context – what you heard? You don't know how that arose, do you?

A Huh-uh.

Q Yes or no, please.

A No.

Q And you say you were in and out. Did you stay for the whole conversation?

A No.

Q So you heard snippets of a conversation, correct?

A Yes.

Q How long were you in the room present – well, actually when you come into the room, did you actually sit down and join the conversation?

A No, I was just in and out of the room. I just listened to bits and pieces of it.

[4140] Q So you don't know what was said before you were in the room, then you went out, when you came back in, correct?

A Uh-huh.

Q Again, yes or no.

A Yes.

Q And you don't know, I mean, whether this was a serious discussion or not, correct?

A Yes.

Q You do?

A No, I don't.

Q You don't know. I mean if, um, he had said, you know, I'm making a story or anything of the sort, correct?

A I don't know.

MR. KEALY: Nothing further.

THE COURT: Ms. Voss?

REDIRECT EXAMINATION

BY MS. VOSS:

Q Uh, when you – you did hear Mr. Hurtz say that he had killed two people?

A Yes.

Q Did he describe whether they were male or female?

A He said male and female.

Q Did he say who he shot first?

A Yes.

Q Who did he say he shot first?

[4141] A The girl.

Q Did he say where he shot her?

A In the head.

Q What did he say he did next?

A Then he reached over and shot the guy.

Q And did he say what town they were in?

A No.

Q Did he say – describe the area in any way?

A Um, he just said it was in a parking place.

Q A parking area?

A Yeah. Yes.

Q And did he say what he did after the homicides?

A Yes, he said he – he was full of blood after the shooting, and he ran through a field, threw mud up on himself, and then went to make the phone call for somebody to pick him up.

MS. VOSS: Thank you. I have nothing further.

MR. KEALY: Yes, please, if I may?

THE COURT: You may.

RECROSS EXAMINATION

BY MR. KEALY:

Q When did Mr. Hurtz say that this murder had taken place?

A I didn't hear that.

Q So you don't know whether he was talking about something the week prior, two weeks prior, two months prior, two years prior, ten years ago?

A Yes.

[4142] Q Did he say where this murder took place, in what state?

A No.

Q It could have been in California, Arizona, New York, anyplace, correct?

A Yes.

Q Did, um, he say what day of the week it was?

A No.

Q Did he say who was with him?

A No.

Q And had you ever heard Mr. Hurtz discussing other criminal acts of his before?

A No.

Q You never heard him discuss other instances of murders?

A No.

Q So you don't know what he was talking about on this occasion, do you?

A No.

MS. VOSS: Your Honor, I'm going to object to this.

MR. KEALY: I have no further questions.

THE COURT: Okay. Ms. Voss, any further questions?

MS. VOSS: No, not for the purposes of this hearing.

THE COURT: Then I don't believe a sufficient foundation has been laid to allow this witness to testify as to alleged statements of Mr. Hurtz to be attributed to the incidents with which our trial is concerned without more, so –

[4143] MS. VOSS: Well, maybe I could ask a couple more questions. I don't know – I don't understand the Court's ruling then.

THE COURT: You asked for a 402 hearing, and I made a ruling. All I'm doing is saying, with what I've heard, I would not allow this witness to testify as to what she heard to attempt to tie it into the facts with which our case is concerned.

FURTHER REDIRECT EXAMINATION

BY MS. VOSS:

Q Did he say whether the – where the people were? Like were they in or out of a car?

A They were in the car.

Q Did he describe the car? Did he say whether –

THE COURT: You can't lead her. If you want to testify –

BY MS. VOSS:

Q A station wagon or –

A I can't say – I mean, I don't know.

Q All right. Um, did he say anything else that would identify, uh, any other details about the homicide?

A Not that I can think of.

Q Uh, is Mr. Hurtz, um – did he – has he lived in this area, uh, all his life?

A I don't know, 'cause I wasn't raised with him.

Q Okay. In the last few years do you know where he's lived?

A In Sacramento and Fairfield.

[4144] MS. VOSS: Thank you. I have nothing further.

BY MR. KEALY:

Q You don't keep track of Mr. Hurtz's coming and going, do you?

A No.

Q I mean, two and-a-half years ago, you don't know where he was, do you?

A I believe he lived in Sacramento for a little while, then moved to Fairfield.

Q But I mean, he could go anywhere, you know, for any period of time and you won't know, correct?

A No.

MR. KEALY: That's all I have. Thank you.

THE COURT: All right. Then I'll sustained the objection to –

MS. VOSS: Your Honor –

THE COURT: – lack of foundation to allow testimony as to alleged statements of Mr. Hurtz.

MS. VOSS: Well, your Honor, I would argue that the, um – here we have enough detail to identify these murders, and plus it would be taken in with other murders. The jury should be allowed to decide what weight is given. We have a man and a woman who are killed in a car. The woman is shot in the head. Uh, it's done in a parking area. And, uh, there's certainly not a lot of homicides like that that go on. I would argue that this – there is certainly sufficient detail to allow this in, and it's certainly a direct admission [4145] by Mr. Hurtz that he was involved in these homicides.

MR. KEALY: No, your Honor, I mean, there's – first of all, there's been absolutely no showing that whatever statement was made related in any way to this. To say this is a unique homicide, certainly is not. We cannot pin it down in any period of time in the past five, ten, fifteen years. I mean, she doesn't know.

THE COURT: Okay. I'm going to sustain the objection. You can always recall the witness. You have tomorrow off. I don't know what you can gather, but my feeling is today I'm not going to allow this witness to testify. You can give me authorities too with what was stated today whether or not you have a law that supports your position, but there's not been a sufficient showing that this testimony ties in with the facts of our case.

All right. Do you have another witness?

MS. VOSS: Yes, I do.

THE COURT: All right. You may step down. And do counsel need five minutes?

MR. KEALY: If I could. Do we know who the witness is, if I need to get a book?

MS. VOSS: Harmina Ross. Maybe we should do the transcript right now.

THE COURT: We can do the transcript of Mr. Radossevich.

Okay. Get that ready, and get your reader here, and we'll stand in recess until a quarter to 3:00.

(Recess taken)

* * *

March 16, 1995
4 P.M.
Taped Interview

PAMELA MAPLES

AM = Al McClellan
PM = Pamela Maples

AM The date is 3/16. It is 4 o'clock. This is a taped interview with Pamela Maples.

PM Maples.

AM Pamela Maples. Oh, o.k., I'm sorry.

PM Maple syrup, maple tree.

AM O.K., and we are in Sacramento. Pam, we were talking about a conversation – you were telling me about a conversation that occurred, I believe it was, last April.

PM Uh huh.

AM O.K., alright. Before I get into that, I would like to say that I've talked to you, and I've told you that I wanted to take a quick recorded statement regarding the conversation that you heard involving Tony Hurtz in Vallejo. Right?

PM Uh huh.

AM O.K., and I haven't, have I forced you, or coerced you, or –

PM No.

AM O.K, so you're giving this statement freely, right?

PM Right.

AM I don't have your hand behind your back, or –

PM No.

AM O.K. O.K. Pam, when was it that you heard this conversation?

PM Inaudible.

AM Uh huh. What month?

PM It was in April.

AM O.K. And, what year was that?

PM '84, I mean '94.

AM O.K., so that was April of last year?

PM Uh huh.

AM O.K., and where did the conversation take place?

PM At Los Cerritos in Vallejo, on Los Cerritos Street, at my sister's house.

AM O.K., what's your sister's name?

PM Tammy Treeace

AM O.K., and who was living with Tammy?

PM My cousin, Tony Hurtz, uh, her boyfriend, Ernie Minara..

AM O.K., was it – do you know if it was day or night time?

PM It was daytime.

AM O.K. Tell me what you heard. Tony was, uh, was he sitting in the living room and –

PM No, we were all sitting, it used to be my sister's daughter's room. She had gave it up to Tony Hurtz to rent out.

AM O.K.

PM And they, that was his room, then at the time. And they were all sitting in there, and –

AM Who was in there?

PM Uhm, me, my sister, Tony, and a guy named Steve.

AM O.K. And, what did, what did you hear Tony – what was he discussing?

PM He was discussing a murder case that had been done. He was bragging about that he had done the murder case.

AM That he had done –

PM That he had shot people.

AM O.K. So, he told you that he had done the shootings?

PM Uh huh, he had reached in through the car window and boom, boom.

AM So, he, you heard him say that the victims were in a car?

PM Yes.

AM O.K. You were telling me he said something about being dropped off.

PM Yes, he, I don't know who, who had dropped him off, but he said somebody had dropped him off and he walked up to them and did what he had to do.

AM And what was that? Go ahead.

PM Shoot them.

AM O.K. Then what happened after that? What did he say he did after he shot them?

PM Uh, he shot, he shot them and went out.

AM Relax.

PM Inaudible.

AM Oh, your own words are just fine,

PM O.K. Is that all.

AM Uh huh.

PM Inaudible.

AM You want to take a break? Gather your thoughts.

PM Inaudible.

AM O.K., we're going to take a break. It's 4:04.

AM O.K., the time is 4:07, the date is 3/16, and Pam, you wanted to take a minute to think because things apparently started coming back to you.

PM Yeah.

AM O.K. So, I'll take this moment to ask you, have I tried to put any words in your mouth, or asked you to say anything?

PM No, you sure didn't.

AM O.K. O.K., when you were collecting your thoughts then, and I know you got a little emotional, so that's very understandable. You, uh, I'll let you continue to tell me – you were saying that he mentioned the car.

PM Yeah, where he shot the people. He mentioned he walked up to, I remember, somebody dropped him off to this car, or to a certain point, and he walked up to this car, to these people, took a gun, and shot these people through the door of the driver's, uh, window, put his gun through and shot the driver,

which was supposedly a girl, and the passenger was a guy. And, it took more than one shot to shoot him.

AM And that's what he told you?

PM Uh huh.

AM O.K. Well that was the conversation?

PM Yes, and I don't know for sure if that was the way he, the conversation was going.

AM O.K. And this was Tony Hurtz talking?

PM Yes.

AM O.K. Did he mention whether either of the victims said anything when the shooting was taking place.

PM I don't remember any of that.

AM O.K. Did he say whether there was any yelling, or anything? Or do you not remember?

PM I thought there was some yelling, or something or other, but I don't remember what about.

AM O.K. Did he say whether there was anyone else there, or any other cars? Or, did he not say?

PM I don't remember him saying that.

AM O.K. Alright. What did he say he did after he did the shootings?

PM He took off running, and he was in the woods or running through something that was to cover up blood enough to, he found mud somewhere to cover up the blood that was all over his clothes from when the blood splattered from the lady's head and stuff, it just splattered all over him, and he was trying to find

somewhere he could go to throw mud so he wouldn't be noticed.

AM O.K. Is there anything else you can remember as we sit here today?

PM Nah.

AM I can tell you're getting upset.

PM Inaudible. No, not yet. No, I can't remember anymore than this.

AM O.K. The time is 4:10, the date is 3:16. This has been an interview between myself and Pam Maples. My name is Al McClellan. Pam, let me think a moment and see if I have anymore questions for you. I just want to reiterate a little bit. He told you, or you heard him say that the woman's head exploded, or that –

PM Yes.

AM O.K.

PM He was saying he shot her in the head, on the side of her head, and it just splattered all over the place.

AM Splattered. O.K. O.K. So he didn't use the term "exploded," he said it "splattered"?

PM Exploded, splattered, I mean it's all the same thing.

AM O.K. Alright, I was just taking back the word that I had put out there cause I just wanted to be as accurate as possible. O.K. And, after it splattered on him, well he –

PM All over the place.

AM Did he describe what kind of car they were in?

PM No, I don't remember, I, uh –

AM O.K.

PM I thought it was maybe a two-door he was saying, or something like that, but I'm not for sure.

AM O.K.

PM I can't say, you know, about the car.

AM O.K. Well, I don't have anymore questions right now. And, I'll be in touch with you, o.k.?

PM O.K.

AM This is the end of the interview.

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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>JOHN FRANCIS FRY,<br>Defendant and Appellant. | A072396<br>(Filed March 30, 2000)<br>(Solano County<br>Super. Ct. No. C34299) |

John Francis Fry was convicted of two counts of first degree murder and sentenced to life imprisonment without the possibility of parole. On appeal, he contends we must reverse his conviction because there was insufficient evidence to support the jury's verdicts; the trial court erred by ordering the jury to continue deliberations after nine jurors informed the trial court they did not believe further deliberations would be beneficial; the trial court erred in its editing of certain testimony read-backs requested by the jury; and the trial court erred in various of its rulings dealing with the admission of witness testimony and cross-examination. We affirm the judgment.

## I. FACTUAL AND PROCEDURAL HISTORY

Because the central issue on this appeal is the sufficiency of the evidence to support the murder conviction, we are required to review the extensive evidence in the lengthy trial record to determine whether the judgment was supported by substantial evidence. (*People v. Hawthorne* (1992)

4 Cal.4th 43, 63; *People v. Johnson* (1980) 26 Cal.3d 557, 576-578)

### *THE CRIME*

Between 6:15 and 6:30 a.m. on October 27, 1992, the bodies of James and Cynthia Bell[1] were discovered in a white 1978 Camaro automobile parked on the dirt shoulder of interstate 505 near the freeway intersection with VacaValley Parkway. Both victims had been shot. Cynthia's body was on the driver's side, with the window down. The victim's left arm was resting on the door sill, and her body was turned to the left as though she had been talking to someone outside the vehicle. According to witnesses who first saw the body, the upper portion of Cynthia's head was "missing." James's body was in the front passenger seat, slumped toward Cynthia's body. The car keys were in the ignition and turned to the "on" position. However, the engine was not running; the gas tank was empty, and the battery was dead. Black, sooty carbon deposits were visible directly below the tailpipe, indicating the car had been idling for some period of time at that location. There was an empty paper soft-drink cup from a Chevron minimart between James's thighs.

When police officers and paramedics arrived at the scene between 7:00 and 7:30 a.m., they found the bodies "ashen," "very cold," "very firm," and mottled or marbled in appearance. Pictures were taken of the victims' bodies and the crime scene between 8:30 and 10:00 a.m., before the

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[1] At various points during the trial, Cynthia Bell was also referred to as "Cynthia Edon." For consistency, throughout this opinion we will refer to the female victim in this case as Cynthia Bell.

bodies were moved or disturbed. By the time the coroners removed the victims from the car between 11:00 and 11:30 a.m., the bodies were totally rigid and stiff, and retained their postures when moved.

Three bullets were recovered: one from James' cheek; a second from the passenger door; and a third from the rear floor of the Camaro behind the passenger seat. Dr. Aaron Lipton, the pathologist who performed the autopsies on the victims, testified that Cynthia had sustained "massive damage" to the upper part of her face and skull, "with a large area of these areas of the face and skull absent . . . [a]nd a large portion of the brain material beneath the skull also absent." Dr. Lipton opined that the gunshot wound to Cynthia's head, which was the cause of her death, was the result of someone shooting her in the face from only inches away. Under the circumstances, the shooter "[p]ossibly" would be "covered with blood and tissue" from the victim. James had a total of eight bullet wounds on his head, chest, back and wrist; death resulted from the wounds to the head and lungs. Dr. Lipton opined that James' wounds were caused by shots fired at him from the driver's side of the car.

Based on the photographs of the victims taken after their bodies had been taken out of the Camaro, Dr. Lipton opined that they appeared to be "in full rigor mortis," a condition which, in a temperate climate like that present at the time and location of the crime, usually develops "between six and twelve hours" after death and then subsides within 36 hours. Rigor mortis would manifest by a "very firm" condition of the muscles directly under the skin. At the time he performed the autopsies, beginning at approximately 8:30 a.m. on October 28, 1992, Dr. Lipton noted only "mild" or "moderate" rigor mortis remaining in

the victims' bodies. On cross-examination, Dr. Lipton testified that he originally estimated the victims had died three or four hours before the bodies were found, based on the pictures and the descriptions given by the police investigators. However, he also testified there are many different variables affecting the accuracy of any estimate of the time of death based on rigor mortis.

Several witnesses testified to having seen an older-model white Camaro, matching the description of the victim's car, parked at the crime scene between approximately 8:30 and 10:00 p.m. on October 26, 1992, in the same location and position where it was subsequently found with the victims' bodies the next morning. At least four different witnesses also described seeing an older-model pickup truck with a light-colored camper shell parked near the Camaro at *some* point during this time period.

Two other individuals testified that they encountered the victims and their white Camaro at a nearby convenience store sometime between 8:40 and 9:00 p.m. on the evening of October 26, 1992. Both witnesses testified they saw James talking on a pay telephone, and heard Cynthia say something referring to "Leroy." Neither witness could tell whether Cynthia was talking to James about someone else named "Leroy," or addressing James by his own middle name of "Leroy." A third witness saw both victims sometime between 9:30 and 10:00 p.m. on October 26, 1992, at the Chevron minimart where she worked as a cashier. James purchased a soft drink at the time.

### *PROSECUTION WITNESS TESTIMONY*

Several prosecution witnesses testified to appellant's erratic behavior during the weeks prior to the murders. Arleen Murphy had known appellant for 32 years, although she had lost touch with him for about 10 years until meeting him again in October 1992. On October 24, 1992, appellant drove Murphy to Davis in his blue truck with a white camper shell on it. As he "always" did, appellant had a gun in a case on the dashboard of his truck. He was also carrying a second gun in his belt. After driving Murphy out a back road and stopping in an isolated location on a levee, appellant told Murphy he was upset because he thought she was in league with their mutual acquaintance Ryan Bernal to steal $1,300 from him, and it was time for her "to go to sleep." Murphy tearfully tried to tell appellant she had no reason to steal from him. Saying he "had to show somebody up north that he had killed" her, appellant held his gun out of the window and fired two shots into the air. Appellant then told Murphy "he was going to get to the bottom of why . . . he was being told [Murphy] was going to steal" his money. Then appellant drove Murphy back to a gas station where Murphy's aunt, Lynn Ruiz, worked. Appellant again told Murphy "[s]ome people up north" were supposed to think she was dead, and to stay in hiding for a couple of days "so he could get to the bottom of this."

Murphy next saw appellant on the morning of October 26, 1992, when she unexpectedly found him sitting on a couch in the apartment of one of her friends where the front "door had been kicked in" and was off its hinges. Appellant told Murphy he had arranged a meeting at his house with her aunt Ruiz, "to get to the bottom of this and find out what was going on." Appellant drove Murphy in

his truck back to his house. Murphy then paged Ruiz, who arrived several hours later. At various points during the afternoon, Murphy saw a number of people at appellant's residence, including appellant's girlfriend Betty Jo Ringler; appellant's brother Edgar Fry; Shannon Nissen; Debbie Mathies; and Bernal. Murphy did not participate in the conversation between appellant and Ruiz. After talking with Ruiz, appellant assured Murphy everything "was going to be okay" between them. Around 5:30 p.m., shortly after Ruiz left, the two victims arrived and stayed awhile. Murphy could not recall seeing them leave. Later, appellant asked Murphy to purchase a gun for him from David Sparks, one of two other men who had arrived at the house, saying she "could get it cheaper" than he could. Murphy declined.

In order "to make sure everything was cleared up," Murphy asked appellant if she was "free to go" Appellant said, "Yes." Then he told her he was "going to go kill" Cynthia and James Bell because Cynthia had stolen from him and broken into his house. Appellant had thought Murphy knew the Bells, which had caused him to suspect Murphy of being involved in a plot against himself. Appellant wanted Murphy to go with him, but she refused. Appellant then left with Bernal, and Murphy left appellant's house shortly thereafter.

On cross-examination, Murphy testified that she did not immediately call the police to tell them about appellant's threat to kill the Bells because she "was really upset and stressed" and "didn't think he was serious." She did not tell the police about appellant's statement for at least a month because appellant had not yet been arrested and she "was really scared" of him.

Lynn Ruiz, Murphy's aunt, had been friends with victim Cynthia Bell for 15 years, and had known James Bell for about 5 years. On October 24, 1992, she saw Murphy and appellant at the gas station where she was working. Murphy appeared "nervous" and "antsy," like she was "in a hurry or bothered or something." At approximately 1:30 p.m. on October 26, 1992, Ruiz received a page from a telephone number she did not recognize. When Ruiz returned the call, appellant identified himself, stated he had asked Murphy to place the page for him, and said he wanted to talk with Ruiz about Cynthia. Appellant gave Ruiz his address and asked her to stop by his home after she got off work. Ruiz agreed.

When Ruiz arrived at approximately 4:00 p.m., she found appellant outside his house by his "old," "bluish" pickup truck. Appellant told Ruiz he was "upset" with Cynthia because she owed him $600 to $800 for drugs and "[h]e thought she was trying to rip him off." Appellant described an incident in which Cynthia had entered his house without his permission and "was shocked" when she opened his bedroom door and found him there. He believed Cynthia was trying to steal methamphetamine from him, and he wanted to talk to Ruiz about it because both Cynthia and Murphy had mentioned her name and "respected [her] opinion." Ruiz agreed that Cynthia was probably trying to steal drugs from appellant, and told him to "[k]iss her off," "stay away from her," and "ignore her." Appellant told Ruiz he had been upset with Murphy because he thought she was involved in a conspiracy with Bernal and others "to rip him off also," and described the incident in which he had taken "her for a ride out to the country," "scared her and threatened her," and "took his gun and told her he was going to blow her away . . . if she

didn't explain. . . ." He had pointed his gun at Murphy's head, and had then fired "a couple shots out the window to scare her or something." Appellant told Ruiz that Murphy and Bernal "had to prove their loyalty." He "wanted to blow everybody away," and had only refrained from killing Murphy because he had "known her for 20 years" since they "went to school together."

The next day, Ruiz heard about the discovery of the bodies by the freeway, and was worried it was Cynthia and James Bell. She drove to the victims' apartment to check on them. She found the apartment dark and a police officer present. She told the officer about her conversation the day before with appellant, in which appellant had been upset with the Bells because he thought they were trying to steal drugs from him, and "he wanted to blow everybody away." The following day Ruiz gave a taped interview to the police in which she stated that appellant had talked about taking his gun and blowing Cynthia's head off.

Lynn Reed was another long-time friend of Cynthia Bell and Murphy. She had purchased drugs from appellant as well as used them with him. In the early afternoon on October 25, 1992, appellant came to Reed's house looking for Murphy. Appellant was "[u]pset, angry, [and] frustrated" because, he said, Cynthia had stolen "[a] large amount of drugs . . . from his house." Appellant told Reed that Cynthia had come into his house by a sliding glass door when she thought he was not at home and had stolen drugs from him while he hid in his closet and watched her. Appellant came by Reed's residence again around 6:30 p.m. on October 26, 1992, driving his "baby blue" pickup truck with a camper shell on it, and accompanied by a "young man." Appellant wanted to purchase an ounce of methamphetamine for $900. He offered a gun for collateral

when Reed replied that amount of drug would cost $1,100. When no agreement was reached, appellant left appearing "really anxious and frustrated."

Kathleen (Debbie) Mathies's testimony at an earlier trial was introduced through reading a transcript.[2] Mathies testified that she was alone with appellant in his house a "couple" of days before the murders when someone knocked on the door. Mathies could see through a window that it was Cynthia Bell, and she informed appellant of that fact. Appellant told Mathies not to answer the door. Mathies went upstairs to see appellant in his bedroom, and closed the bedroom door. Cynthia went around to the back of appellant's house and entered through a sliding glass patio door. She then came upstairs and opened appellant's bedroom door. Cynthia appeared "shocked" and "surprised" to find that someone was there, and said she just wanted "to see what was going on" at the house. After a few minutes, Cynthia left. Later, Mathies overheard appellant tell Ringler that he was going to kill Cynthia because "she did him wrong" over "[d]rugs and money." Mathies was also present at appellant's house on October 26, 1992, the day of the murders. At some point that day, she again heard appellant say he was going to kill Cynthia, and complain that Cynthia "owed him money for

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[2] In connection with Mathies' testimony, the trial court told the jury: "Counsel and the Court have been going over a transcript of the prior testimony in September of 1994 of the witness Debbie Mathies. We had anticipated that Debbie Mathies would be here earlier this week, and then even as late as today, and counsel have agreed that we can read her testimony and make a finding that she's unavailable for trial because of her voluntary use of drugs and unable to testify. And the fact that she is unavailable is in no way connected to any acts or influence of the defendant, Mr. Fry. This lady is unavailable for the reasons of her own voluntary use of drugs."

drugs, and they are lying and doing him wrong." Mathies had been using methamphetamine, marijuana and alcohol during the entire time period at issue.

In addition to Murphy, Ruiz, and Mathies, three other witnesses – Shannon Nissen, David Sparks and Edgar Fry – testified about appellant's actions in the days leading up to and including October 26, 1992, the date of the murder. A few days before the killings, appellant informed Nissen that Cynthia owed him $800 for drugs, and that Cynthia had told his girlfriend Ringler that appellant was sleeping with Cynthia. Appellant "wasn't happy" about this. Appellant's brother, Edgar Fry, testified that during the day on October 26, appellant told him that "a day or so before this time" Cynthia had come into his residence without permission, and he had caught her coming up stairs. Appellant appeared "[i]rritated"; he told Edgar he believed Cynthia had intended "[t]o steal his drugs." Appellant had a .357 revolver which he "usually" took with him whenever he left the house, carried in a soft tan-colored canvas case.

On October 26, 1992, Nissen was at appellant's residence with appellant, Bernal, Murphy, appellant's brother Edgar, and Ringler and her two girls. Victims Cynthia and James Bell were also present for some period of time during the day. In addition, Sparks and his friend Jason Gibeau arrived at some point in the evening in a dark minitruck. Sparks was carrying a .38-caliber pistol and approximately $1,000 in cash, because he was interested in purchasing an ounce of methamphetamine. There was some discussion between Sparks and appellant about the latter purchasing Spark's gun, but no sale of the gun took place. There was also some discussion of purchasing drugs at appellant's house, but Sparks declined because he already had a deal set up elsewhere. After about 30 minutes, Gibeau

and Sparks left in Gibeau's truck. Bernal asked appellant if they were meeting at "505." Appellant replied, "That will work." Shortly thereafter, between 7:00 and 7:30 p.m., appellant retrieved his gun, and he and Bernal left in appellant's truck after telling Edgar he "was going to go make a drug deal, do some business." At some point thereafter, Cynthia and James Bell also left appellant's house.[3] Edgar testified that Cynthia told him she was going to meet appellant near the "Wild Oates" store. The victims left in their automobile, a light-colored 1970's Camaro.

Sparks testified that after he and Gibeau left in the latter's truck and were on the Interstate 80 freeway to Vacaville, a vehicle pulled up very rapidly behind them. As it came "[a]s close as you could get without touching," Sparks recognized appellant's truck. Both vehicles pulled over to the side of the road, and Sparks got out of Gibeau's truck to talk with appellant. Appellant apologized to Sparks that "things . . . didn't work out at the house," and expressed interest in selling him some methamphetamine. Sparks agreed to ride in appellant's truck and talk with him on condition that appellant would drive him to Vacaville.

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[3] Like much of the testimony in this case, there was some conflict in the witnesses' recollection of when the victims arrived at appellant's house on October 26, 1992, and when they left. As seen, Murphy testified the Bells arrived at approximately 5:30 p.m. shortly after Ruiz's departure, and she did not see them leave. Nissen testified that Cynthia and James Bell were present at appellant's house during the afternoon, and that they left about half an hour after appellant left with Bernal. On the other hand. Edgar Fry testified that the Bells were not at appellant's residence when he arrived there at approximately 5:00 p.m., and did not show up until 30 to 45 minutes after appellant left with Bernal. According to Edgar, the victims stayed for another 30 to 45 minutes and then left.

Bernal got out of appellant's truck and left with Gibeau in the latter's truck.

When Sparks got into appellant's truck, he saw a soft gun carrying case on the seat or the dashboard. Appellant proceeded to drive Sparks around for about 45 minutes, persistently trying to convince Sparks to "put some money up" and "go in" with him on purchasing a larger quantity of drugs, stopping at various locations to talk with different individuals about buying drugs or selling Sparks' gun, and ignoring Sparks' repeated requests to drive him to Vacaville. Sparks began to feel "really uncomfortable." Finally, when appellant stopped at a gas station and walked in, Sparks got out of appellant's truck, approached a motorist, and obtained a ride to Vacaville.

Both Nissen and Edgar Fry testified that Bernal returned to appellant's house sometime later in the evening, stayed for a few minutes, and then left again. Hours later that night appellant returned, driving his light blue pickup truck with the camper shell on it. Nissen, Edgar, Mathies, and Ringler were all at appellant's house when he returned. Edgar, who was not wearing a watch, estimated that it was approximately 10:30 p.m. when appellant returned.

Nissen, Edgar and Mathies each gave somewhat differing accounts of appellant's actions and appearance upon his return home. Nissen testified that appellant was wearing a T-shirt, blue jeans and tennis shoes, and was carrying his gun case. According to Nissen, there were spots of blood on appellant's shirt, his shoes, his forehead, the gun case, and "maybe his pants." Appellant appeared "tired" and "kind of nervous"; he went to the kitchen, wiped his face and forehead with a towel, and then walked

up to his bedroom. Edgar testified that appellant was wearing "[p]ants with no shirt," and carrying a "satchel or briefcase." He immediately went "straight upstairs" and into the bathroom off the master bedroom, from which Edgar heard running water. In response to Edgar's question, appellant said he had taken his shirt off because there was blood on it. Edgar saw a large spot of blood on appellant's pants. Mathies saw appellant drive up and then sit in his truck for a while before coming in the house and going upstairs to the bathroom, where he washed blood off his hands. Mathies could not remember whether appellant was wearing a shirt.

Nissen, Mathies, Edgar and Ringler all followed appellant upstairs to his bedroom. Mathies testified that after coming out of the bathroom, appellant said that he had "killed her," and "had to do James, too," He reported that "[h]e blew their heads off with a gun," and that Cynthia's head "looked like spaghetti." He had shot James Bell "a couple of times in the back" after missing with his first shot. According to Nissen, appellant "kind of smiled" and asked him if he "had ever seen what a .357 does to someone's head at close range." When Nissen shook his head "[n]o" appellant said "It's not pretty." Referring to Cynthia Bell, appellant stated "we wouldn't have to worry about her anymore." When appellant announced that the Bells "were taken care of," Edgar asked him if he "had done" Cynthia. Appellant said, "Yes." According to Edgar, appellant said he told Cynthia "she shouldn't have fucked with him," and told James "he was sorry" before shooting him. Like Nissen, Edgar also testified that appellant commented that "you couldn't imagine what a .357 would do . . . [t]o somebody's skull." Appellant pulled a nickel-plated .357 gun out of the gun case and unloaded it. The

gun contained four spent shells and two live shells, which both Edgar and Nissen described as .357 "wadcutters." Appellant asked Nissen if he wanted to clean the gun. When Nissen declined, appellant handed the gun to Edgar, who cleaned it for him. Both Nissen and Edgar testified - they saw what appeared to be blood on the gun. In addition, Mathies saw blood on appellant's wrist watch, which appellant also asked Edgar to clean off.

Both Mathies and Edgar Fry testified that appellant and Edgar discussed what to do with appellant's bloody clothes. Edgar told appellant that if he "did do it," then "he better get rid of his clothes." Edgar volunteered to take them with him when he left. At first appellant resisted the idea, because he had few pairs of pants and the ones he was wearing "were good pants." Eventually appellant gave Edgar a paper bag, which Edgar assumed contained appellant's clothing. He disposed of it in a dumpster. He knew that he could get in trouble for destroying evidence, but did it because he wanted to help his brother. Appellant left the house again around 11:30 p.m., saying he was going to the Chevron station to "make a transaction." Appellant returned about 20 minutes later. Edgar left appellant's house between 1:00 and 2:00 a.m. that morning.

Nissen spent the night at appellant's house. The next morning, appellant asked him to help take the camper shell off appellant's pickup truck. Appellant was in a hurry; he told Nissen he "didn't want people to recognize the truck." While they were working on the truck, appellant told Nissen "that he shot [Cynthia Bell] and her boyfriend." Appellant described shooting Cynthia once in the head from the driver's side of the car, after which James Bell had turned toward appellant, put his hands in

the air, and said "What the fuck are you doing." Appellant then demonstrated how he had shot James three times, "'pop, pop, pop.'" Nissen did not report appellant's confession when the police questioned him about the murders on October 28 as they served a search warrant on appellant's residence, because appellant was his friend, and he "didn't want him to get in trouble." In addition, Ringler and appellant both told Nissen that, if asked, he should say appellant was home at the time of the murders. A "couple days" later the police returned to the house to talk with Nissen, and threatened to arrest him for possession and use of methamphetamine. At that point, Nissen decided to tell the police what he knew in order to avoid arrest. On cross-examination, Nissen admitted reading press accounts of the killings before he spoke to the police. However, he testified he never felt threatened by the police to tell anything but the truth, and that he did tell the truth.

Like Nissen, Mathies did not contact the police despite her knowledge of appellant's involvement in the murders. She testified she did not contact the police and initially denied knowing anything because she "was scared." She denied changing her story because the police had threatened to arrest her and take her children away. When she first heard appellant threaten to kill Cynthia Bell, Mathies did not believe it, and simply thought it was "an expression." On cross-examination, Mathies testified that Nissen was not in the bedroom when appellant was cleaning up after the killings.

Edgar Fry testified that during a conversation with appellant after the police first searched appellant's residence and seized his clothing, appellant told Edgar that he had thrown the .357 into the bushes at the Chevron station after he drove by his house and saw police activity

there. Appellant said someone named "Mike" picked up the gun for him. A few days after the killing, while they were working on a car together, appellant told Edgar that he had the power "[t]o give or take life." Appellant told Edgar to "[j]ust keep [his] mouth shut" if contacted by the police. Edgar intended to do so, until contacted by the police and offered immunity for telling what he knew. The police never asked him to say anything but the truth, and never threatened him other than to tell him what he "was up against."

During the search of appellant's home on October 28, 1992, police found a gun box labeled "'Ruger, Security-six, .357 Magnum Cal. stainless steel.'" The police also found a metal box containing 12 bullets on a bookcase in appellant's bedroom, a loaded Winchester .22-caliber rifle in the living room closet, a "pipe bomb," and a loaded .22-caliber revolver under the seat of a red Chevrolet pickup truck parked at appellant's residence. The police were not able to find any other gun on the premises. There was a white camper shell in appellant's backyard. There were two small .3 gram packages of methamphetamine on the premises, as well as marijuana and drug paraphernalia. Appellant arrived on the premises while the officers were serving the warrant. There was a loaded .22-caliber pistol in his jacket pocket and five additional rounds of .22-caliber ammunition. The police also found a 12-gauge shotgun and .22-caliber rifle in the blue pickup truck appellant was driving upon his arrival. The white camper shell was subsequently found to fit the blue pickup truck. Appellant was arrested for gun possession and then released.

Police records showed that appellant had registered a Ruger Security Six .357-magnum pistol on May 22, 1991.

The gun was light silver in color, with a "brushed," "satin finish" and black rubber grips. An analysis of three of the bullets found at the crime scene showed that two were "semi-wadcutter" style, and one was a "round-nosed" style bullet. All three were fired from a gun with lands and grooves matching those of either a .38-special or a .357-magnum.

On November 10, 1992, Dixon police received a request to "be on the lookout" for appellant in connection with the murders. Police officers observed appellant the next morning and followed him into a gas station. When asked to stay in his vehicle and keep his hands where the police could see them, appellant accelerated his vehicle and quickly drove out of the gas station. The police activated lights and siren and attempted to execute a traffic stop, but appellant drove on through a stop sign and entered the freeway. Appellant accelerated to a speed of about 90 miles an hour before police were able to force him to stop. Appellant was taken into custody.

The prosecution offered the testimony of Robert Jacobitz, a jailhouse informant. Jacobitz testified that while they were incarcerated in the same facility, appellant asked his advice on joining a prison gang called the Aryan Brotherhood. Jacobitz told appellant that one had to "make your bones" by killing someone before being allowed to join. While together in the law library, appellant told Jacobitz about his case, and said his brother was "the star witness in the case against him." The more appellant talked about his brother, the angrier and more vehement he became, stating: " 'My brother has cost me 2-1/2 years of my life, and now he's trying to cost me my whole life.' " Jacobitz told appellant he should have his brother "whacked, taken care of," i.e., killed. Appellant

replied that this would not help because the prosecutor could simply use his brother's testimony from the two previous trials; "[w]hat he needed was his brother to change his testimony to offset other witnesses." Jacobitz told appellant he could arrange to have people call on his brother to coerce him to change his story, possibly by cutting off his finger. Appellant repeatedly stated his intention to kill his brother after he had "let some time pass."

Jacobitz testified that appellant discussed the facts of his case with him in detail. Appellant said he had been "doing a lot of crazy things" during the time just before the murders, "going around kicking people's doors in" and "putting guns to their heads." Because Cynthia Bell owed him money and he had caught her breaking into his house, appellant arranged to meet her in a secluded "undeveloped" area of Vacaville with the intent to kill her. When appellant arrived, the Bells were already there. Appellant told Jacobitz that he walked up to the Bell's car, leaned down and kissed Cynthia on the cheek while she sat in the driver's seat, said something to her, and then "blew her head off" by shooting her once with his .357 handgun. Appellant then reached across her, and said:

"'I'm sorry, James. You're in the wrong place at the wrong time.'" He then shot James three times. Appellant told Jacobitz that a piece of Cynthia's skull was found 35 feet away, and that he had blood on his shirt, pants and shoes. Appellant told Jacobitz the killings were "almost like a sexual rush." When he returned to his house he was "pumped up" and splattered with blood, and made incriminating statements to his brother and other witnesses. Among other things, appellant told Jacobitz he had said "'You should have seen what a .357 does to a girl's head.'"

Appellant told Jacobitz his brother had disposed of his bloody clothes in a trash can, and that his girlfriend's "best friend," a "black male," had the murder weapon in his possession.

Jacobitz and appellant discussed the various witnesses testifying against him and what could be done with respect to each of them. Appellant reportedly thought Nissen could not "be tampered with" because he was currently living out of state. Appellant thought that because of her heroin addiction, Mathies might be vulnerable to a "hot shot," or mortal overdose. Appellant also told Jacobitz that an out-of-state truck driver claimed to be an eyewitness to the murders and was testifying that appellant was not the murderer. Appellant and Jacobitz "were both laughing" about the truck driver's testimony. Appellant gave Jacobitz the names of his brother, his brother's wife, and the fact they had three children. Jacobitz took notes and wrote down the names. Later, appellant himself wrote down Edgar's name and address on a piece of paper and gave it to Jacobitz. The piece of paper was admitted in evidence at trial.

Jacobitz testified that he decided to contact the authorities and become an informant after appellant told him he would be willing to harm his brother's children. Jacobitz had recently become a father for the first time, and "felt that was wrong." Jacobitz sent the district attorney an eight-page letter detailing what appellant had said, without asking for any compensation or reward.[4] In

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[4] According to Jacobitz: "When he told me he had no problem if . . . the . . . last alternative is using the kids to get his freedom, I know that John Fry is out of control and needs to be stopped."

return for additional cooperation, Jacobitz subsequently received diversion to a counseling program for a pending domestic abuse charge, and the district attorney agreed to recommend that Jacobitz's parole not be revoked. As a result, Jacobitz testified, he had "been branded a snitch," which "could be a death sentence in prison." During the period prior to trial Jacobitz had been isolated from the rest of the jail population for his own protection. On cross-examination, Jacobitz admitted convictions for robbery and larceny, and acknowledged that he had had access to one of appellant's newspaper clippings on this case.

During the course of renovations to a commercial building at 5141 Quinn Road in Vacaville in May 1993, appellant's gun, a .357 Ruger, was discovered in the metal "channel" of a door frame, inside its tan canvas case. The gun was not loaded, but a speed loader found with the gun contained six bullets. Of the bullets, two were .38's and four were .357's. According to the individual who found the gun, the bullets were "blunt" or "flat" on top. The building where the gun was found was approximately one mile from the location of the murders. The gun was confirmed to be the weapon appellant had previously registered with the Vacaville police. Edgar Fry testified that the gun found in the building on Quinn Road was the same gun he cleaned off on the night of the killings. He also testified that the canvas gun case "looks familiar" and "very well could be" appellant's. An expert criminalist testified that one of the bullets recovered from the victims had definitely been fired from appellant's gun. Two other bullets found at the crime scene "could have been fired from" that gun as well, although there were too few markings on the slugs to be certain they had come from appellant's gun.

Michael Walker testified that in late 1992 he rented space at 5141 Quinn Road for a general repair shop. For the last three months of the year, Walker shared the space with one "Mike Turner." In exchange for his oral promise to pay half the rent, Turner had his own key to the rental unit, "stored some stuff" there, and came and went as he pleased. Near the end of December 1992, Turner "stopped coming around" because of a dispute with Walker over money Walker knew appellant from when they both drove trucks for the same company. About one month before the murders, appellant and Ringler "stopped by" Walker's shop on Quinn Road when he was there. Michael Turner was seen standing across the street from appellant's house at the time the police served the search warrant on October 28, 1992. After the police spoke with Turner briefly, he walked away from the area.

Douglas Carter, a dispatcher at the trucking company for which both Walker and appellant had worked, testified that he helped Walker move his possessions out of the Quinn Road unit in March 1993. One or two days before appellant's arrest, Carter saw appellant outside the offices of the trucking company. Knowing that the police were looking for appellant, Carter asked him "if he killed the kid out there in Yolo County," referring to a recent shooting death. Appellant said, "No," but added that "he killed the people in Vacaville." Appellant told Carter that the people he killed had been "harassing him and his kids," and that "he just went to his pickup, got his gun and killed them." When Carter asked him "'. . . What were you thinking,'" appellant replied, "'I just messed up.'" When Carter told appellant "he should turn himself in," appellant said, "'No,' . . . 'they won't catch me.'" Carter did not go to the police with this information because he did not

want to get involved. He also did not know whether to believe appellant's confession, "because sometimes he seemed kind of full of hot air."

### *Defense Witness Testimony*

In his defense, appellant offered evidence and testimony to show that (a) he was not present at the scene of the crime when it occurred; (b) the prosecution's witnesses were not credible; and (c) at least three other people (Daryl Borelli, Ryan Bernal, and Anthony Hurtz) were linked to the murders, and had means, motive, and opportunity to commit them.

Appellant's girlfriend Ringler and her daughter Cynthia C. gave testimony on the identities of the persons coming, going and staying at appellant's residence on October 26, 1992. Cynthia C. confirmed the testimony of Nissen and Edgar Fry that appellant left the house at approximately 7:00 p.m., shortly after Sparks and Gibeau left; and that Cynthia and James Bell were in the house for at least 20 to 30 minutes between 7:30 and 8:00 p.m. before leaving. Cynthia C. also confirmed that appellant generally carried his handgun on the dashboard of his truck. Ringler similarly testified that appellant "always had his gun with him," and he "always" took the gun with him when he got out of his truck. However, on the day after the murders, when appellant drove Ringler to work in his pickup truck, Ringler could not recall whether he brought his gun with him.

At trial, Cynthia C. claimed she could place appellant's return to the house at precisely 10:01 p.m., because she turned around and looked at the clock when he came in the door. According to Cynthia C, there was nothing

unusual about appellant's appearance; he was carrying a black briefcase, wearing jeans and a T-shirt, and appeared "casual." She did not see any blood on him. On the other hand, she admitted originally telling the police she could only estimate the time of appellant's return home as between 9:30 and 10:15 p.m. because she did not look at the clock. Cynthia C. also claimed that Bernal came to the house at 11:00 p.m., about one hour *after* appellant returned; appellant never left the house again that night; and she would have seen appellant leave because he would have walked by where she was watching television.

Ringler testified that on October 23, 1992, she and appellant agreed that Ringler should "take over" appellant's drug business and collect his debts because appellant "wasn't doing very well." After that, "everybody had to deal with" her. According to Ringler, she and Cynthia Bell were "[v]ery good friends"; although she had a serious "fight" with Cynthia on October 24, 1992, they resolved it the next day. Ringler testified that she did not know about the incident in which Cynthia had "broken into" appellant's residence until Cynthia herself told her about it. Ringler did not know what Cynthia owed appellant, although she knew Cynthia owed money for a "sixteenth" of methamphetamine Ringler had "front[ed]" her. Ringler testified that appellant never gave Cynthia a hard time about the money Cynthia owed him, and she never heard appellant ever say he wanted to harm or kill Cynthia or James Bell. However, Ringler conceded that appellant was angry with Cynthia because of her attempt to break into his residence, with what he believed was an intent to steal drugs; indeed, as a result of that incident, Cynthia and appellant were not speaking to each other and appeared to be trying to avoid each other.

Ringler testified that appellant came home between 10:00 and 10:30 p.m. on October 26, 1992, wearing a T-shirt and pair of jeans. Appellant was "tweaking" on methamphetamine, but otherwise appeared "basically normal for him at that point in time." Ringler did not see any blood on appellant's shirt or pants, or anything in his hands. After a while, appellant went to the Chevron station, and then returned after about 15 minutes. He went straight upstairs without washing himself. Ringler denied hearing appellant talk about harming Cynthia or James Bell that night, hearing any discussion of what to do with appellant's clothing, or seeing any blood being cleaned off appellant's body, gun or watch. Ringler acknowledged that she knew Michael Turner; Turner was "a good friend" of hers; he was present at the house on the night of the search warrant; she introduced Turner to appellant; and she saw Turner alone at the "shop" on Quinn Road where the gun was later discovered. However, Ringler denied ever asking Turner to do anything with appellant's gun. Ringler admitted that she continued to have a relationship with appellant at the time of trial, and that she lied to the police to protect him when initially questioned about his whereabouts on the night of the murders.

Manuel Michel, another "good friend" of appellant, testified that he saw appellant at a liquor store between 6:00 and 7:00 p.m. on October 26, 1992. Later, he went by appellant's house. According to Michel, he was already at appellant's residence when appellant returned that evening, and "was the first one [appellant] saw when he opened the door." He and appellant went upstairs, where they consumed methamphetamine. Michel denied that appellant had any blood on him at the time.

Pete Joy testified that he met appellant at a Chevron station sometime between 10:00 and 10:30 p.m. on October 26, 1992, to buy some methamphetamine. They left around 11:00 p.m. Shannon Joy testified that appellant looked "jumpy and a little shaky." She and her husband sent appellant $80 after his house had been searched, and let him stay in their mobile home.

Ronald Lewis, who had known appellant for about five years as of the time of trial, testified that he saw appellant and Mathies the day after Lewis heard about the murders. Lewis testified that Mathies had a "very bad" reputation for truthfulness.

Charles Morton, a criminalist expert in firearms, testified that there were insufficient markings on the bullets found at the crime scene to match them to appellant's gun. Although he conceded there was "significant agreement" between test bullets fired from appellant's gun and the bullets that killed the victims, he opined the agreement was not "sufficient" to make an identification.

### *Appellant's Testimony*

Appellant testified in his own defense. In October 1992, he owned a 1977 "[p]owder blue" Ford pickup truck with a white camper shell. At the time he also owned five guns, including a Ruger .357-magnum. Appellant denied killing either Cynthia or James Bell, threatening to do so, or talking with anyone about having done so.

Appellant testified that he began selling drugs to support his own methamphetamine habit after he was fired from his truck driving job in September 1992, He was

not very successful at it, and was "slowly losing ground." Appellant met Cynthia Bell because she was a friend of his girlfriend, Ringler. He would "front" one-sixteenth of an ounce of methamphetamine to Cynthia, who would in turn "cut" the drug, divide it into smaller parcels, and then pay him back after selling it herself. Although Cynthia was in debt to appellant for as much as $700, appellant claimed she would always pay him back. Just before she was murdered, Cynthia owed him between $150 and $170. Appellant claimed that he never threatened Cynthia about the money she owed him.

Appellant described the incident on October 23, 1992, in which Cynthia Bell "entered my house without asking, or broke into the house, however you want to say it." He claimed that he did not get angry at Cynthia; instead, he was "more amused" by the incident. After Cynthia found him in his bedroom, he "fronted" her a quantity of methamphetamine, injected her with some of the drug, and then socialized with her and James Bell. He claimed that after that, everything "was fine" between them.

Appellant had known Murphy from going to school with her between 1966 and 1979. He started selling drugs to her in October 1992. Murphy introduced appellant to Bernal about one week before October 26. Through Bernal, appellant also became reacquainted with Daryl Borelli, whom appellant had known in high school. Bernal served as a conduit for drug purchases by appellant from Borelli. On October 25, Borelli brought two ounces of methamphetamine to appellant's house. They had never dealt personally with each other before. Later that night, Borelli came over to appellant's house again. They talked in appellant's bedroom about the "games" Bernal was playing, and decided that from then on Bernal would not serve

as a "middleman" for them. According to appellant, Borelli told him that as long as he had Murphy and Cynthia in his business, he "was going to have problems," and Cynthia "shouldn't even be able to breathe the air that we do." Appellant denied saying anything negative about Cynthia to Borelli or twirling a gun around in his presence.

Appellant acknowledged driving Murphy out into the country on October 24, 1992. He claimed he was merely taking the "rural route" to Davis. According to appellant, Murphy was "hysterical," so he simply let her talk for a while. Then he began to question her about a tape recording he had heard of a suspicious conversation between Murphy and Bernal. Appellant denied threatening to kill Murphy at any time or pointing a gun at her. According to appellant, he simply "decided to play a little game," and shot his gun out of the truck window twice. Appellant next saw Murphy on the morning of October 26, when, according to him, she called to ask him to pick her up at a friend's apartment in Davis. When he arrived, he became irritated because no one was there. He kicked the door, and it "flew open." He then went in and sat on a couch, thinking "somebody would show up sooner or later." When Murphy arrived, appellant left a note apologizing for the damage to the door.

Appellant asked Murphy to contact Ruiz because he wanted to ask her advice about how to get along with heavy methamphetamine users. He denied making any threats against the Bells or anyone else while talking with Ruiz. He "could have said something" to the effect that he felt "like just blowing them away," but he was only "laughing and joking," and not directing the comment "toward any one person." Appellant decided he "didn't want to deal in drugs anymore," because he "didn't want to put up with

the games that were being played," and was planning on "cutting everybody loose," including Cynthia. He did not want to talk to Cynthia or have anything to do with her, although she would continue to be welcome in his house because of her friendship with Ringler. Appellant denied making any arrangements with Cynthia to meet her at the intersection of Interstate 505 and VacaValley, or anywhere else that day.

Sparks arrived at appellant's house with "another kid" whom appellant did not know between 5:30 and 6:00 p.m. on October 26, 1992, and tried to sell appellant a .38 special. Appellant did not buy it because it was damaged. According to appellant, Sparks said he had some money and was looking for an ounce of methamphetamine. Because he did not want to deal in his house, appellant told Sparks to wait in a nearby park while appellant tried to find some drugs. Appellant and Bernal left in appellant's pickup truck at the same time Sparks left. When Sparks proceeded onto the freeway instead of toward the park, appellant followed close behind and blinked his headlights. They pulled over, and agreed that Sparks would come with appellant to look for methamphetamine while Bernal went with Gibeau and then met them at a gas station in an hour. Once appellant found some methamphetamine, however, Sparks was no longer interested in buying it and instead asked appellant to take him to Vacaville. Appellant declined, saying he would take Sparks to the agreed rendezvous. According to appellant, Sparks "was so spun, he couldn't talk." After driving around for awhile looking for someone to purchase Sparks' gun, appellant stopped at the gas station and got out to telephone Ringler, leaving his own .357 gun on or under the seat. When appellant returned to the truck, Sparks

was gone. Appellant did not see Sparks leave; he assumed Bernal had picked him up. Appellant did not check to see if his gun was still in the truck.

Appellant testified that after Sparks left, Bernal and Gibeau arrived and talked with him for about 20 minutes before leaving. John Peterskoff and Manuel Michel, two of appellant's former trucking acquaintances, also pulled up at the gas station. After drinking beers and socializing with them for at least an hour, appellant telephoned Ringler at approximately 7:00 p.m. Thereafter, he "shot up," and drove home "very slowly." When he got home, he "pulled into the driveway and sat there for a while," "trying to maintain control" and "get a focus." After Mathies, Nissen and Ringler asked him if he "was going to come inside or just sit out there all night," he came inside with his briefcase and his shirt on. Because appellant "was pretty spun" on drugs at that point he "didn't even think about" his gun, even though it was his normal custom always to retrieve his gun from the truck and bring it into the house with him in the briefcase or some other holder. Appellant went upstairs, put down his briefcase, and went into the bathroom. He denied changing his clothes or having any blood on him. A few minutes later, someone came to the bedroom and informed appellant that Michel was there to see him. Michel stayed for about an hour talking with appellant and taking drugs. Between 10:00 and 10:30 p.m., in response to two telephone calls, appellant went to the nearby Chevron station to supply Pete and Shannon Joy with methamphetamine. After about 20 minutes, appellant came home and went to sleep.

The next morning, appellant asked Nissen to help him take the camper shell off of his pickup truck because he wanted to save gas mileage. He denied telling Nissen he

did not want anyone to recognize the truck, or saying anything to Nissen about the victims. Appellant claimed to have asked Nissen to take his gun from his briefcase, and to put it behind the seat of the truck. According to appellant, his "last clear recollection" of the gun was seeing in on the seat of his truck while he was talking with Sparks. He assumed the gun was in his briefcase because it was his usual habit to put it in the briefcase when he got out of the truck and went into the house. Appellant conceded that his usual custom was to have a trigger lock on the gun, and that it would have to be removed for the gun to be used.[5] Appellant also admitted he lied to the police when asked when he had last seen his .357. Appellant denied asking Turner to get rid of his gun.[6]

Appellant denied telling Carter that he killed the Bells. According to appellant, Carter asked him whether he killed someone in Yolo County and whether he "did the two in Vacaville." After "playing with [Carter's] mind" and "having fun" with him a bit, appellant told him "No, but they sure think I did." Appellant claimed he fled from the police when they tried to arrest him because he "had no intentions on going to prison for three counts of murder that I didn't do."

Appellant denied confessing to Jacobitz or giving him any information about the Bells' murder. According to

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[5] On October 28, 1992, the police found a trigger lock in a gym bag on the passenger floorboard of appellant's pickup truck.

[6] Appellant testified he did not know Turner, and was introduced to him the first time when Turner came with Ringler to pick him up at the police station. According to appellant, he did not ask Turner to "get rid" of his gun because "I didn't even know Mike Turner. I wouldn't ask somebody I didn't know to do something like that."

appellant, Jacobitz was a known "liar"; appellant was suspicious of him because he asked too many questions about appellant's case and wanted to read all of appellant's newspaper clippings. Appellant let Jacobitz read some newspaper clippings, which Jacobitz kept for several days. However, appellant would not let Jacobitz read the police report because he mistrusted him. Appellant thought Jacobitz may have heard him talk with other inmates about how witnesses had testified at his earlier trials. Appellant testified that while in the county jail law library, Jacobitz offered to help him by having Edgar killed. Appellant rejected the offer, saying he just wanted Edgar "to tell the truth," i.e., that Edgar "had been threatened" by the police to give testimony against appellant. On cross-examination, appellant admitted that he gave Edgar's address to Jacobitz. According to appellant, he "didn't think [there] was any harm" in doing so even though Jacobitz claimed to be a member of the Aryan Brotherhood and had offered to have Edgar "done in," because Jacobitz was "a liar."[7]

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[7] In support of his testimony in this regard, appellant offered the testimony of two other county jail inmates (James Stevenson and Brett Swafford) that Jacobitz was in the vicinity when appellant talked about what had happened at his previous trials. According to these inmates, appellant only talked about what the witnesses said, and did not discuss what he himself actually did or did not do. The inmates testified that Jacobitz read the Vacaville newspaper, and was interested in newspaper clippings about appellant's case which he obtained either from appellant directly or through one of the inmates to whom appellant had loaned them. Swafford testified that appellant expressed concern about Jacobitz, saying he did not trust him, and volunteered that he was "going to have some fun with the guy." Swafford was impeached with prior felony convictions, and admitted that appellant was a "good acquaintance" of his in the jail.

(Continued on following page)

### *Time of Death Evidence*

Appellant offered markedly conflicting testimony from several witnesses in an attempt to establish that the murders could not have occurred during the time frame established by the prosecution witnesses. Russell Carter, a truck driver from Missouri, testified that when he drove by the scene of the murders between 6:10 and 6:45 a.m. on October 27, he saw several people and at least *five* vehicles: an old two-tone brown Ford van, a dark brown 1975-1977 Oldsmobile Cutlass, a beat-up old Volkswagen, a 1981-1982 silver Cadillac, and a Camaro. Carter saw a woman in the driver's seat of the Camaro; an approximately 40-year-old man with a light blue T-shirt standing next to the Ford van; a gray-haired man in the driver's seat of the Cadillac with a woman with long gray hair in the passenger seat; another person in the Oldsmobile; and yet another man walking toward the Camaro with a small pistol in his hand. This man had light brown shoulder-length hair, was five feet seven to eight inches in height and about one hundred forty pounds in weight, and was wearing a T-shirt, jeans and a baseball cap. When he reached the Camaro, the man shot the woman in the head, causing blood to splatter all over the windshield. Meanwhile, the man standing next to the van was talking into a portable scanner or telephone. Carter called 911 on his CB radio, drove to the business to which he was making a delivery, and called 911 a second time. Although Carter had never seen appellant before, he was sure appellant

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In addition, Charles Millard testified that he visited appellant in county jail as a favor to appellant's mother. According to Millard, about one week before trial appellant told Millard he was concerned that Jacobitz was a "snitch" because he persisted in asking about appellant's trial.

was not the man he saw shoot the woman because the shooter had a full head of hair. On cross-examination, Carter conceded he was some "distance" away from the scene; because he had "to watch the road" as he drove his tractor-trailer by, he could not "see all of it."

Still other defense witnesses gave contradictory and inconsistent evidence about what they saw and the times that they saw it as they drove by the scene of the murders. Charles Anderson testified that when he drove by the murder scene at approximately 8:15 p.m. on October 26, 1992, he saw an older Camaro or Firebird together with a light green mid 70's Ford pickup with a lumber rack and no camper shell. Robert Tavares testified he saw a white Camaro and a blue 1970's Chevrolet pickup parked side by side approximately one hour later. According to Tavares, a "very skinny," 6-foot-tall 20 or 30-year-old white male with dirty blond shoulder-length hair got out of the passenger side of the car. Tavares did not see anyone else around, and could not tell if the windows of the Camaro were open. In direct contradiction to Tavares's testimony, Scott Schriefer testified that he did not see *any* vehicles in the area when he drove by the murder scene at approximately 9:15 p.m. Lisa Peer saw an older white Camaro and a newer red Camaro racing up Interstate 505 sometime during the night of October 26. At approximately 12:08 a.m., Peer saw the same two cars parked at the scene of the murders. A very petite, 5-foot-4-inch woman with short brown hair was apparently arguing with a man about five feet eight to nine inches with "new-fangled" spiky hair, who towered over her. When Linda Daraskavich drove by the same scene about 3:05 a.m., she saw the Camaro and an older model, dark-colored pickup truck. A tall, thin man, six feet to six-foot three inches in height and wearing

a dark-colored baseball cap, was walking from the car to the truck. Daraskavich could not tell if the windows of the Camaro were rolled up or down.

### *THIRD PARTY CULPABILITY EVIDENCE*

Through the testimony of several witnesses, appellant tried to establish that one or more of several other individuals was the actual perpetrator of the murders in this case. The defense theory was that these persons were acting on behalf of Daryl Borelli, another local methamphetamine dealer to whom Cynthia Bell owed money.

#### *BORELLI*

Called as a hostile witness by the defense, Borelli himself testified that he and appellant had been acquainted from school, but were never friends. Borelli was employed as a custodian at the University of California in Davis; he denied selling drugs in 1992 or that Bernal worked for him as a middleman, and claimed that no one owed him any money in 1992. Borelli had known Michael Walker, the man who rented the space where appellant's gun was found, for eight years. Borelli denied having anything to do either with the Bells' murder, or with the disappearance of appellant's gun.

According to Borelli, the first contact he had with appellant since grade school occurred when appellant called his house in October 1992, told Borelli's wife that Bernal and Murphy were trying to "rip him off," and asked Borelli to come over to appellant's house immediately if he wanted to see Bernal alive again. Borelli went to appellant's house and met with appellant and Bernal in appellant's bedroom. Appellant was heavily under the influence

of drugs; he accused Cynthia Bell of trying to steal his drugs and owing him $600, and talked about blowing her head off. While doing so, appellant was twirling a cocked .357-magnum around his finger and playing a tape of a telephone conversation between Bernal and Murphy. Borelli acknowledged that he did not immediately tell the police about appellant's threats against Cynthia Bell, explaining that he did not want to get involved. He told the entire story only after he heard that appellant was accusing him of the murders.

Debra Lyn Neundorf testified via transcript from a previous trial. She had been friends with Cynthia Bell for 15 years and had dated Borelli for 2 years, although not in October 1992. Neundorf testified that Borelli never told her he was present when the Bells were shot, and she never heard him agree to meet Cynthia on Interstate 505. She denied ever selling drugs to Cynthia on Borelli's behalf; hearing Borelli threaten to kill Cynthia; hearing Borelli say that Cynthia owed him money; or ever telling anyone that Borelli was responsible for the Bells' murders or had said he was, or that she herself was a witness to the killings. Neundorf admitted that in September or October 1992, Borelli commented that Cynthia Bell "shouldn't be allowed to even breathe the air." However, she did not believe this to be a threat. According to Neundorf: "Daryl thought that about a lot of people. It was a way to keep me home and not find out . . . what he was doing out and about." Neundorf never saw Borelli in a red Camaro or with a .357-magnum handgun. She denied she ever told defense investigator McClellan that Borelli told her "he had a gun that was used in the homicides of the Bells" which "he got rid of." Neundorf also denied Borelli had ever threatened her, or that she was afraid of him. On

cross-examination by the People, Neundorf testified that when she was interviewed by defense investigator McClellan and the defense attorney, they tried to tell her things that she knew not to be true, without tape recording the interview or providing her with any report for her to review.

To contradict Borelli and Neundorf, the defense offered the testimony of several witnesses who claimed Neundorf had previously indicated that someone other than appellant had committed the murders. George McCleese testified that Neundorf told him she had witnessed the homicides, and appellant "wasn't the one that did it"; instead, she said they were committed by "[h]er boyfriend," without identifying him directly. Neundorf drove a green Ford pickup truck. McCleese talked with Anthony Hurtz about appellant when the two were in custody together in March 1993. According to McCleese, Hurtz told him appellant would not be convicted because appellant did not commit the murders, and the gun used in the killings was hidden in a storage shed on Leisure Town Road. McCleese did not recall whether Hurtz said he was involved. He also testified he did not believe Hurtz, because of Hurtz's own reputation as a "loud talker" who liked to "make himself look big." McCleese was impeached with several felony convictions for burglary and receiving stolen property. He admitted he had previously testified that Neundorf did not tell him anything about witnessing the murders or her boyfriend committing the crimes.

To support McCleese's testimony and impeach Neundorf appellant offered the double hearsay testimony of McCleese's mother, Helen Dixon, to the effect that the boyfriend of Dixon's daughter told Dixon that Neundorf had said she knew it was not appellant "that did the

killing" because she (Neundorf) was there at the time. Dixon was not told who did commit the "killing," or even what murder(s) were being discussed. Appellant also offered the testimony of Diane McClure, a legal secretary, that while present at an interview of Matthew Cordell she heard Cordell state he had sold large amounts of methamphetamine to Borelli; he had witnessed drug transactions between Borelli and Cynthia Bell; and he had heard Borelli express anger against Cynthia because she had "burned" him, as Borelli rolled some bullets back and forth in his hand. When on the stand, Cordell himself denied making any of these statements. Cordell did testify he heard Sparks say he had been dropped off at the "country Oates store" while the victims "were being done."

*HURTZ*

Aside from this testimony purportedly linking Borelli to the murders, the defense offered evidence of the possible involvement of Anthony Hurtz. Hurtz himself testified that in October 1992 he made "[t]he majority" of his money in construction, doing "concrete work." He denied making money selling drugs; ever selling drugs to Cynthia Bell; or even knowing the victims, appellant, or any of the other principal individuals in this case. He denied any involvement in the Bells' murder or telling anyone he had been involved, and claimed he was at home with his girlfriend in Sacramento all night on October 26, 1992. He also denied possession of a 357 revolver in October 1992. He admitted he had been convicted of at least one felony, and that he use to go "by the name of Leroy or Uncle Leroy."

To contradict and impeach Hurtz, appellant offered the testimony of several witnesses linking Hurtz to the

murders. Hurtz's former girlfriend Chantelle Eittreim testified via transcript that she was living with Hurtz in late 1992, at which time he was heavily involved in drug trafficking, selling four to five pounds of methamphetamine every other day. At the time, he owned both .357-magnum and .38-caliber handguns. According to Eittreim, after receiving a page sometime after 10:00 p.m. on October 26, he told her he had to go to Dixon to meet "Ryan" because "'[s]ome bitch burned one of my friends, and I have to go take care of it.'" Eittreim accompanied Hurtz to Dixon where Hurtz met with Bernal in a restaurant for about 20 minutes while Eittreim remained outside. After Hurtz took her home, he left again and did not return until the next morning. Eittreim tried to page him several times during the night, but he did not respond. In December 1992, Hurtz told her the police were looking for him because they wanted to question him about the murders. He told her he had attended the meeting at which the killings were planned, and was also there when the victims were murdered. According to Eittreim, Hurtz told her "that [Cynthia] took it like a man," while "James was on the floorboard with his hands over his head begging not to be shot." After October 26, Hurtz changed the outer appearance of his automobile and started acting "paranoid." On cross-examination, Eittreim could not state Hurtz's pager number, conceded she did not like Hurtz, and admitted she was addicted to methamphetamine in October 1992.

Both of Eittreim's parents testified for the defense. Candida Eittreim testified that at first, Hurtz told her he had committed the murders of the Bells. Then he changed his story to having been involved in the murders. Finally, he told her he had only helped plan the killings and was

there when they were committed. He asked for her help in getting an attorney, and her husband hired one for him. Later he threatened to kill her and her family if she testified in this matter. On cross-examination, Mrs. Eittreim admitted she did not contact the police "right away" after Hurtz's alleged confession because she did not believe him; and when she was later contacted by the police, she "misled" and lied to them. Mr. Eittreim testified that in January 1993, Hurtz asked him to pick up a .357 revolver from a storage unit off Leisure Town Road in Vacaville. As soon as he did so, Mr. Eittreim turned it over to the police.

Kenneth Keith, yet another admitted methamphetamine abuser, testified he was rooming with Eittreim and Hurtz in October 1992. Keith did not think Hurtz came home on the night of October 26, although he had only "vague" recollection of that date and was using drugs at the time. According to Keith, in January or February 1993, Hurtz told him he knew Cynthia and did not like her because "[s]he had a big mouth and she talked a lot." Hurtz also told Keith he had seen the Bells on "[t]he night that it happened," and he knew who killed them but "he wasn't going to tell."

Harmina Ross, another former girlfriend of Hurtz and the mother of his child, testified he had begun dealing drugs in 1992. Although she tried paging him several times on October 26, he did not respond. In December 1992, Hurtz told her he had shot two people at close range while they were sifting in a Camaro in a vacant lot in Vacaville; the second person killed had begged not to be shot and "tried to get away." Later, Hurtz changed his story and told her he was only a suspect and was not responsible for the murders. Ross acknowledged that she

did not come forward with Hurtz's confession until she was contacted by a defense investigator. When Ross subsequently spoke with the police, she did not mention Hurtz's confession.

Eliane West was a friend and neighbor of Hurtz in October 1992. She testified that Hurtz told her he was present at the planning of the murder of the two people in the white car out in the area of the Nut Tree. She did not relay this information to the police. According to West, Hurtz sent her a letter threatening that if she "said anything to anybody about him being there when they were planning it, that they would never ever find [West]. He would guarantee it." West was unable to produce the letter, claiming it was stolen from her apartment. She did not remember the date on the letter or how many pages it was. She also testified that Hurtz had sent her two friendly notes from jail.

### *BERNAL*

Finally, the defense also attempted to link Ryan Bernal to the murders through the testimony of several additional witnesses. Bernal himself did not testify because of his pending prosecution for the murder of Gibeau and his consequent invocation of the Fifth Amendment. The testimony of other defense witnesses was introduced to establish that Bernal had known Borelli for approximately 15 years and sold methamphetamine on his behalf. About one week before the date of the murders on October 26, 1992, Murphy introduced Bernal to appellant.

Ryan Vergos, who testified through transcript, lived with Bernal and his family in a mobile home on the property of his uncle George Santos. Bernal owned a faded

black baseball-type cap. Vergos did not know appellant, and did not see appellant with Bernal on October 26. That evening, Bernal left in a small truck sometime between 8:30 and 9:00 p.m. Bernal did not come home until the next morning between 7:30 and 9 am. Bernal told Vergos that his uncle "helped him" with some killings in Vacaville. Several days later, Bernal told Vergos that it was actually appellant who had killed the Bells. Vergos testified that Bernal was a liar, and was very afraid of Borelli, for whom he sold methamphetamine. Cynthia Bell had purchased methamphetamine from Borelli regularly, and Vergos heard Borelli say she owed him money. A week before the murders, Borelli was furious because he needed $1,500 that Cynthia owed him, and "he wanted her taken care of."

Cordell told a defense investigator that Nissen said he had lied about appellant's involvement in the murders in order to protect Bernal. Nissen described Bernal as his "best friend," whom he had met through another drug client of appellant named Jason Kraak. Kraak in turn testified that Nissen had a "very bad reputation" for "making up stories, lying," and untruthfulness. Although Nissen never told Kraak he was going to lie or had lied in his testimony about appellant's involvement in the killings, he did say that he, Murphy and Bernal had decided they were "going to put it off on" appellant. This was because Bernal "was young and had his whole life ahead of him," and because the police had played them a tape recording in which appellant threatened to kill Nissen.

On cross-examination, Kraak conceded that Nissen never said he was going to lie about appellant and the murders, and Kraak did not know whether or not Nissen's statement about "putting it off" on appellant was the truth. Kraak testified that a few days after the homicides,

appellant told him that Cynthia Bell "was found with her head blown off from the jaw up." Appellant told Kraak that the police had shown him photographs of the victims when he was arrested; he asked Kraak if he had "ever seen what a .357 wadcutter does to a person." Appellant never told Kraak that he had killed the Bells, and Kraak never saw appellant with a gun.

### *Rebuttal and Surrebuttal*

In rebuttal, the prosecution offered evidence Harmina Ross told the police that Hurtz had told her he was a suspect in the victims' murders but was not responsible for their deaths, and "he gave her reasons why." Ross never gave the police any information that Hurtz had confessed to the murders himself.

Officer Robert Lee testified that on November 2, 1992, Ringler's daughter Cynthia C. told him appellant carried his handgun wherever he went, and she had last seen him with it at approximately 6:00 p.m. on October 27, 1992. He was carrying it in a brown-colored, soft handgun case. According to Officer Lee, Cynthia C. had never mentioned appellant carrying a briefcase.

Finally, the prosecution offered evidence that in his initial contacts with the police, truck driver Russell Carter told the police that he had stopped his truck at the scene of the crime at approximately 6:50 a.m. on October 26, 1992, and approached the victims' car, at which point he observed that someone had been shot. Carter did not report that he actually saw the shootings take place, and did not mention the presence of any people other than the victims at the scene. Aside from reporting that he observed one "mid-sized, four-door Oldsmobile" leaving the area.

Carter did not mention any other vehicles in the area. Carter also told the police he thought the shootings must have been done by means of a rifle. The police did not follow up on Carter's report because it was totally inconsistent with the physical evidence at the scene, the fact the killings had been committed with a handgun, and the actual condition of the victims' bodies when found around the same time Carter claimed to have seen them.

In surrebuttal, the defense offered the testimony of an employee of the business to which Carter made a delivery at approximately 7:00 a.m. on October 27, 1992. He described Carter as looking "like he saw a ghost, . . . very distraught, very upset." Carter told him he had seen someone standing next to a car holding a gun pointed in the window, who then got into a brown car and drive away.

### *Procedural Background*

Appellant was charged in February 1993 with three counts of first degree murder of three victims (James Bell, Cynthia Bell, and Jason Gibeau), with allegations of the special circumstance of multiple murder and of firearm use. (Pen. Code, §§ 187; 190.2, subd. (a)(3); 12022.5.)[8] In May 1993, appellant's section 995 motion to set aside the information was granted with respect to the charged murder of Gibeau.

Appellant's first two trials resulted in mistrials due to juror deadlock. Appellant's third jury trial commenced on February 24, 1995. On June 8, 1995, the jury convicted

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[8] Unless otherwise indicated, all further statutory references are to the Penal Code.

appellant of first degree murder on both counts, and found true the allegations of firearm use and multiple murder special circumstances. He was sentenced to life in prison without the possibility of parole, plus a term of 35 years. This appeal followed.

## II. SUFFICIENCY OF THE EVIDENCE TO CONVICT

Appellant's principal contention is that there was insufficient evidence to support the jury's verdict that he murdered Cynthia and James Bell. Based on our exhaustive review of the lengthy record, we conclude there was ample evidence to support the conclusion that appellant was guilty as charged.

### *STANDARD OF REVIEW*

When the sufficiency of the evidence to convict is challenged on appeal, the critical inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319, original italics; see also *People v. Berryman* (1993) 6 Cal.4th 1048, 1083, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) An appellate court "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson*, *supra*, 26 Cal.3d at p. 578.)

In reviewing the evidence adduced at trial, our perspective must favor the judgment. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Barnes* (1986) 42 Cal.3d 284, 303-304; *People v. Matian* (1995) 35 Cal.App.4th 480, 483-484.) "This court must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] If the circumstances reasonably justify the trial court's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.] The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact; it is not whether guilt is established beyond a reasonable doubt. [Citation.] [¶] Before the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it. [Citation.]" (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) The standard stated by California cases is entirely consistent with the controlling federal law. (*Jackson v. Virginia*, *supra*, 443 U.S. at pp. 318-319; *In re Winship* (1970) 397 U.S. 358, 362.)

There is no question that the prosecutor's burden is a heavy one. "To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence." (*People v. Hall* (1964) 62 Cal.2d 104, 112.) Nevertheless, even though "[e]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction" (*Redmond*, *supra*, 71 Cal.2d at p. 755), this court is bound by the findings of the

trier of fact where, by its verdict, it has rejected an hypothesis pointing to innocence and there is evidence to support its implied finding that guilt is the more reasonable of the two hypotheses. Moreover, we must be ever mindful of the fact that it is the exclusive province of the trier of fact to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. (*Barnes*, *supra*, 42 Cal.3d at p. 303.) "Thus, even though the appellate court may itself believe that the circumstantial evidence might be reasonably reconciled with the defendant's innocence, this alone does not warrant interference with the determination of the trier of fact. [Citations.] Whether the evidence presented at trial is direct or circumstantial, . . . the relevant inquiry on appeal remains whether *any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Towler* (1982) 31 Cal.3d 105, 118, original italics.)

### *Substantial Evidence Supports the Verdicts*

Appellant argues that the prosecution's evidence of his guilt is undermined by his competing evidence (a) suggesting the victims were murdered after 10:30 p.m. on October 26, 1992, the time at which the prosecution witnesses testified that appellant returned home; (b) attacking the credibility of the prosecution witnesses; and (c) raising the possibility of third-party culpability involving Borelli, Hurtz and Bernal. This argument simply asks this court to reweigh the evidence and make different determinations of credibility than those already made by the trier of fact. This we may not do. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.)

There was ample evidence to support of [sic] the jury's verdicts. Numerous witnesses testified that Cynthia Bell owed appellant money for drug transactions, and he had recently been deeply angered when he caught Cynthia sneaking into his house unannounced and entering his bedroom, evidently with the intent to steal from him. At least three witnesses – Murphy, Ruiz and Mathies – testified that appellant had threatened to kill Cynthia Bell during the few days immediately preceding the murders. Several witnesses, including his own brother, testified that when appellant returned home after 10:30 p.m. on the night of the murders, he was spotted with blood. His handgun also had blood on it, and contained four spent shells. He made incriminating statements to his brother and several other witnesses, saying he "did" Cynthia and James Bell and describing the impact of a .357-magnum bullet on a human head. Appellant's gun was found in a location tied to appellant and his girlfriend, and expert testimony established that one of the bullets recovered from the victims had definitely been fired from appellant's gun. Appellant fled from police in a high-speed chase when they attempted to take him into custody. Finally, he confessed his crime to a fellow inmate, tried to arrange to have his brother Edgar and his family injured in order to coerce Edgar to change his testimony, and even wrote down his brother's name and address to give to the other inmate.

Appellant's evidence does not undermine the substantiality of the prosecution case. His own testimony about his activities and whereabouts on the night of the murder was extraordinarily vague, particularly with regard to the critical time period between 7:00 and 10:30 p.m, Many details of appellant's testimony were actually in conflict

with the testimony of other defense witnesses.[9] The physical evidence of the victims' bodies, found in a state of full rigor mortis as of approximately 11:00 a.m. on October 27, was consistent with placing the time of the murders around 10:00 p.m. the night before. On the other hand, the physical condition of the bodies was completely inconsistent with appellant's reliance on the testimony of truck driver Russell Carter, who claimed to see the murders take place at 6:50 a.m. on October 27, or just before the arrival of the police at 7:00 a.m., by which time the bodies were already stiff cold and ashen.[10] The fact the victims' Camaro had its ignition in the "on" position with an empty gas tank and obvious carbon buildup below the exhaust pipe clearly indicated the car had been idling there for a lengthy period of time. In short, appellant's theory that the victims had been shot only minutes before the police arrived was unbelievable and completely contrary to all the other evidence in the case.[11]

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[9] For example, Michel testified he was the first person appellant saw when the latter returned home the night of October 26, and they immediately went upstairs together. Appellant, in contrast, testified he went upstairs as soon as he came home that night; only later did someone come up to his bedroom to tell him Michel was there to see him.

[10] Needless to say, truck driver Carter's alleged observation of the murders at 6:50 a.m. is also inconsistent with the earlier discovery of the bodies sometime between 6:15 and 6:30 a.m.. by William Patterson, the man who first called 911 and reported the murders to the police. Carter also gave the police several inconsistent versions of the event, including that he had not seen the actual murder and speculated that it had been committed with a rifle.

[11] Appellant actually offered a wide variety of possible times the victims could have been shot, based on the testimony of all the various defense witnesses who made ambiguous sightings of something suspicious taking place at the location of the murders at different times

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Appellant's evidence of the purported third party culpability of Borelli, Hurtz and Bernal was both contradictory and weak. Other than alleged "confessions" by these individuals to others, there was no physical evidence linking them to the crime, and no witnesses to their activities on the night of the murders. Moreover, the supposed "confessions" were themselves ambiguous and self-contradictory. The witnesses who testified to these confessions themselves lacked credibility, either because they had personal motives rendering them hostile to the alleged suspects or biased in favor of appellant; or because of their own failure to give timely, truthful information to the police. In light of the prosecution evidence of appellant's threats against the victims prior to the murders, his bloody clothing and gun on the night of the killings, his admissions to several witnesses, the discovery of appellant's gun and its establishment as the murder weapon, and appellant's high-speed flight from the police, the jury was not required to accept this flimsy defense evidence.

Finally, appellant's attack on the credibility of the prosecution's witnesses does not render insufficient the evidence of appellant's guilt. These arguments were made by defense counsel at trial, and were rejected by the jury. It was exclusively for the jury, as the ultimate arbiter and finder of fact, to assess and adjudge the credibility of all the witnesses, both prosecution and defense. In the absence of clear evidence that the jury's determination of credibility was egregiously arbitrary, capricious and irrational, we will not

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of the night and morning of October 26 and 27. Appellant's own contradictory evidence, obviously offered in the hope of raising some "reasonable doubt" in the minds of the jurors, was insufficiently substantial to offset the substantial evidence of appellant's guilt.

disturb that determination. (*Barnes*, *supra*, 42 Cal.3d at p. 303; *Towler*, *supra*, 31 Cal.3d at p. 118.)

## III. Propriety of Continued Jury Deliberations

Appellant contends the trial court erred in responding to the jury foreperson's report that the jury was deadlocked by determining that additional deliberations would be appropriate. Appellant is wrong; there was no abuse of the trial court's discretion.

### *Procedural Background*

On May 16, 1995, after 11 days of deliberations, the jury sent the trial court a note from the foreperson stating that she believed "we are deadlocked at this point," and asking the trial court: "Do you have any suggestions for us regarding what we might do to break the deadlock?" The trial court called the jury into the courtroom and asked the foreperson whether (a) if the jury continued in its deliberations, the foreperson thought there was a reasonable possibility that the jury might arrive at a verdict; and (b) whether there was anything further the trial court could do to assist the jury in arriving at a verdict. The foreperson responded that the jurors were "just looking for . . . anything that the Court might suggest that we could try to do to break the deadlock." The trial court inquired how the jury was split, and was told that after four votes, the jury was split seven to five.

The trial court admonished the jurors that each party had a right to the jurors' own individual opinions; "everybody is entitled to their own opinion as a juror"; the jurors

should "unhesitatingly change" their votes if they were shown to be wrong during deliberations; "until you are convinced that you are wrong, then you should stick to your vote"; "if a verdict can be reached, then we want a verdict to be reached"; and "[i]f a verdict can't be reached, then that's just the way it is." The trial court then polled the jury to determine whether they individually believed further deliberations would be useful. Seven jurors agreed with the foreperson that their deliberations "hopelessly deadlocked"; one "[h]esitantly" agreed; one was undecided; and two disagreed. On the basis of this poll, the trial court sent the jurors back to deliberate further, again instructing "that if you are convinced that you are wrong, then you should change, [but] if you are not convinced, . . . you should stick with you own vote. . . ." The trial court told the jurors it would check with them the next day "as to what, if any, progress" had been made, "and if not, then we can go from there again."

At that point, the foreperson asked for further clarification of the concept of reasonable doubt. The trial court told the foreperson to reread the instruction, and added that "it's really you, as individual jurors, when you read that instruction, to apply it and then give it the meaning to which you feel it's entitled." Thereafter, the jury deliberated for two days without communicating with the court. On May 19, the jury requested a readback of some portions of trial testimony, and informed the court it had selected a new foreperson. On May 22, the trial court suggested making an inquiry about whether the jurors felt they were making progress, but the prosecutor objected on the ground that "[they're obviously working," and "if they haven't brought the subject matter up with the Court, we shouldn't be bringing that up." The jury was brought in,

and the new foreperson indicated the jury's willingness to continue deliberations the next day.

On June 1, the trial court sua sponte asked the jury to come into the courtroom to inquire whether there had been any progress in the deliberations. At that time, the new foreperson stated: "Yes, there has been some change." The trial court reread CALJIC No. 17.40 instructing the jury that both sides were entitled to the individual opinion of each juror; each juror was to decide the case for him or herself, after discussing the evidence and instructions with the other jurors; and although each juror was not to hesitate to change an opinion if convinced it was wrong, he or she was not to decide any question in a particular way just because a majority of the jurors, or any of them, might favor such a decision. Upon seeing "all affirmative nods" from the jurors in response to its question whether further deliberation would be helpful, the trial court sent them back to deliberate. On June 8, the jury returned verdicts of guilty on both counts.

### *Applicable Law*

Under Penal Code section 1140, "[e]xcept as provided by law the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." Generally, "[t]he determination whether there is reasonable probability of [jury] agreement rests in the discretion of the trial court. [Citations.] The court must exercise its power, however, without

coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' [Citation.]" (*People v. Breaux* (1991) 1 Cal.4th 281, 319; see *People v. Pride* (1992) 3 Cal.4th 195, 265; *People v. Rodriguez* (1986) 42 Cal.3d 730, 775.)

The issue of coercion is necessarily dependent on the facts and circumstances of each case. (*People v. Sandoval* (1992) 4 Cal.4th 155, 195.) On the one hand, coercion has been found where a trial court, by insisting on further deliberations, expresses an opinion that a verdict should be reached. (*People v. Crossland* (1960) 182 Cal.App.2d 117, 119; *People v. Crowley* (1950) 101 Cal.App.2d 71, 75.) On the other hand, a trial court's refusal to discharge a jury in the face of the jury's repeated reports of impasse does not necessarily amount to an implied suggestion to the jury that a verdict should be reached. (*Rodriguez, supra*, 42 Cal.3d at p. 775.)

Thus, it is neither an abuse of discretion nor inherently coercive for a trial court to inquire into the numerical division of the jury in an attempt to determine whether there is any reasonable probability of agreement, or to ask for a resumption of deliberations after ascertaining the breakdown in juror voting. (*Breaux, supra*, 1 Cal.4th at p. 319; *People v. Sheldon* (1989) 48 Cal.3d 935,958-960; *Rodriguez, supra*, 42 Cal.3d at pp. 775-776, fn. 14; *People v. Carter* (1968) 68 Cal.2d 810, 817.) Similarly, it is not necessarily coercive for a trial court to ask a jury to resume deliberations more than once, even after the jury has deliberated for several days and repeated polling shows the jurors are unanimously negative about the prospects for a verdict. (*Breaux, supra*, 1 Cal.4th at p. 319 [jury twice asked to resume deliberations after four days of

deliberations despite polling showing all jurors negative on prospect of a verdict; held, no coercion]; *Rodriguez*, *supra*, 42 Cal.3d at pp. 775-776 [jury asked to resume deliberations after 18 days of deliberation and 4 impasses; held, no coercion].) A trial court does not abuse its discretion or coerce the jury by inquiring into the numerical division of voting and individually polling the jurors in an effort to see if there was anything the court could do to assist the jury in its deliberations to reach a verdict, as long as the court makes no threats or other statements that could be interpreted either as suggesting that a verdict must be reached, or as exerting undue pressure on any individual juror. (*Breaux*, *supra*, 1 Cal.4th at pp. 319-320; *Carter*, *supra*, 68 Cal.2d at p. 815; *People v. Thomas* (1991) 231 Cal.App.3d 299, 303; *People v. Duran* (1983) 140 Cal.App.3d 485, 501-502.)

Because a trial court is charged with determining whether there is a reasonable probability of agreement, it may properly determine that further deliberation might be beneficial even if the jurors unanimously express the opposite opinion. Where even a single juror expresses the opinion that consensus might be reached if further clarifying instructions are given, it is not an abuse of discretion for the trial court to respond affirmatively to the suggestion. (*People v. Proctor* (1992) 4 Cal.4th 499, 539; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 522; *People v. De La Roi* (1944) 23 Cal.2d 692, 701; *Thomas*, *supra*, 231 Cal.App.3d at p. 303.) Indeed, because one of the primary duties of the trial court is to help the jury understand the legal principles it is asked to apply, "a court must do more than figuratively throw up its hands and tell the jury it cannot help." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

### *Discussion: No Coercion or Abuse of Discretion*

Appellant asserts that the trial court abused its discretion by requiring further deliberation after the foreperson reported the jury was deadlocked. The assertion is meritless, both on the law and on the facts of the record in this case.

That record clearly shows the trial court did nothing to coerce the jury, and did not abuse its discretion in having the jurors continue their deliberations after inquiring into the numerical division of voting and individually polling the members in an effort to see if there was anything it could do to assist them in their deliberations to reach a verdict. The trial court made no threats or other statements that could be interpreted as exerting undue pressure on any juror; nor did it ever indicate that it was necessary for the jury to reach a verdict. The trial court never expressed an opinion on appellant's guilt or innocence of the charges; nor did it comment on the evidence. Indeed, appellant's assertions notwithstanding, the trial court specifically told the jury they were not required to return a verdict.[12]

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[12] The trial court stated: "If after there's a vote or two votes or three votes or, as in your case, four votes, if you are shown that you are wrong or that the evidence does not support your vote, then you should, as the law says, unhesitatingly change. [¶] But until you are convinced that you are wrong, then you should stick to your vote, and that's what was carefully pointed out by both attorneys, and that's the law that I gave you during the instructions. [¶] So with that, the question then boils down, if you wish further deliberation, and you have been in deliberation for quite a period of time – and all of you, the Court knows, were very attentive throughout the trial. We went through a long time. . . . But if a verdict can be reached, then we want a verdict to be

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Thus, the trial court specifically reinstructed that (a) each party had a right to the jurors' own individual opinions and each juror was entitled to his or her own opinion; (b) each juror was to decide the case for him or herself, after discussing the evidence and instructions with the other jurors; (c) although the jurors should "unhesitatingly change" their votes if they were shown to be wrong during deliberations, they should not decide any question in a particular way just because a majority of the jurors, or any one of them, might favor such a decision; (d) "until you are convinced that you are wrong, then you should stick to your vote"; (e) the individual jurors should interpret and apply the instructions themselves; and (f) although a verdict should be reached if possible, "[i]f a verdict can't be reached, then that's just the way it is." The trial court only had the jury continue deliberations after it became apparent that some jurors believed further deliberations would be useful, and that it would be possible to reach a verdict.

On this record, the trial court's actions were clearly not coercive and not an abuse of discretion. (*Breaux*, *supra*, 1 Cal.4th at pp. 319-320; *Carter*, *supra*, 68 Cal.2d at p. 815; *Rodriguez*, *supra*, 42 Cal.3d at pp. 775-776, fn. 14; *Thomas*, *supra*, 231 Cal.App.3d at p. 303; *Duran*, *supra*, 140 Cal.App.3d at pp. 501-502.) There was no error.

## IV. Editing of Testimony Readbacks

Appellant next contends the trial court committed prejudicial error by editing some of the testimony readbacks requested by the jury. Specifically, appellant claims

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reached. If a verdict can't be reached, then that's just the way it is. It's not to – because everybody is entitled to their own opinion as a juror."

the trial court's editing of some of jailhouse informant Jacobitz's trial testimony at the time of its readback to the jury violated appellant's right to have the jurors apprised of all the evidence in the record. The contention is meritless.

At issue is the jury's requested readback of a portion of the trial record relating to appellant's jailhouse conversations with Jacobitz. The jury asked for a readback of the testimony of both appellant and Jacobitz on the subject of what appellant told the latter about this case, and their conversation in the jailhouse library. Later, the jury asked to rehear portions of both individuals' testimony concerning "descriptions of blood and skull pieces" and "gun(s)." In consultation with counsel, the trial court edited the transcripts of appellant and Jacobitz for purposes of readback, striking portions regarding conversations between appellant and *other prisoners* because "[t]hat doesn't respond to the question they're talking about." Defense counsel objected and asked the court to read back large portions of cross-examination. However, the trial court concluded that these portions were outside the scope of the jury's request, which was for a readback of testimony on the *conversations between appellant and Jacobitz.*

The trial court was not required to accede to defense counsel's request. It is the jury's right to have testimony reread, not that of the parties or their attorneys. The trial court's obligation is simply to comply with the *jury's* request. (§ 1138; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1020; *People v. Cooks* (1983) 141 Cal.App.3d 224, 261; *People v. Butler* (1975) 47 Cal.App.3d 273, 284.) Here, the material sought to be included by the defense in the readback was clearly outside the scope of the jury's request. The jury did not ask for testimony about conversations between

appellant and other prisoners in the jail, or about other places where Jacobitz might have gleaned information about appellant's case. It simply asked for a readback of testimony about what Fry told Jacobitz in their own private conversations. The trial court was under no obligation to have Jacobitz's cross-examination read, or any other portion of the record not encompassed by the jury's specific request. (*People v. Cathey* (1960) 186 Cal.App.2d 217, 222.) The jury did not ask for any further readbacks. We may assume that if the testimony actually read to them did not contain the material they wished to hear, they would have said so. (*People v. Gordon* (1963) 222 Cal.App.2d 687, 689.)

Contrary to appellant's assertion, it is not reasonably probable a result more favorable to himself would have occurred had the redacted portions of the testimony also been reread. Jacobitz's testimony was corroborated by the notes he took during his library conversation with appellant, and the slip of paper given to him by appellant with Edgar Fry's name and address. It is not reasonably probable that rereading appellant's testimony that Jacobitz learned these facts by overhearing appellant's jailhouse conversations with other prisoners – which testimony of course the jury had already heard – would have resulted in appellant's acquittal. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)[13]

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[13] Appellant failed to request any instruction pursuant to CALJIC No. 3.20 cautioning the jury about the credibility of jailhouse informants, an instruction that need only be given if requested by a party. He has therefore waived that issue. (§ 1127a; *People* v. *Daya* (1994) 29 Cal.App.4th 697, 714.)

## V. SANITIZATION OF HURTZ'S CONVICTIONS

Appellant argues the trial court erred by permitting the defense to cross-examine Hurtz about his two prior felony convictions, but disallowing it from eliciting the fact that those convictions were for drug-related offenses. There was no error.

After appellant called Hurtz as a witness, defense counsel questioned him about his sources of income in October 1992. When Hurtz testified that he worked as a construction worker, defense counsel asked the following leading question: "And weren't you, in fact, making your money dealing drugs at that time, Mr. Hurtz?" The trial court sustained objections to this question on grounds of both relevance and the fact it was leading. Under further questioning, Hurtz testified that he made "[t]he majority" of his money from construction, and that he did "[n]ot" have "another source of income at or about the time of October of 1992." When defense counsel then attempted to ask Hurtz if it was true he had been convicted of a particular crime, the trial court interposed and ruled: "My feeling would be you could ask him if he has been convicted of a felony, and I'll allow if he's been convicted of a felony, if that answer is true, but not what felony." Thereafter, defense counsel was only able to elicit Hurtz's admission of at least one felony conviction.

Later, defense counsel objected on the record to the trial court's ruling, arguing that Hurtz had in fact been convicted of two felonies – sale and possession for sale of drugs – and that both felonies were crimes of moral turpitude. The trial court ruled that although appellant could impeach Hurtz's credibility with the fact of his felony

convictions, the nature of the crimes of which he was convicted "is of no relevance."

Under California Constitution, article I, section 28, subdivisions (d) and (f), trial courts have broad power to exercise discretion under Evidence Code section 352 (hereinafter referred to as section 352) to permit the use of prior felony convictions for impeachment purposes, so long as the convictions are of crimes involving "moral turpitude." (*People v. Castro* (1985) 38 Cal.3d 301, 306, 312-317.)[14] In addition, trial courts have broad discretion to "sanitize" such prior convictions, in order to reduce a demonstrable potential for unfair prejudice. (*Sandoval, supra*, 4 Cal.4th at pp. 177-178; *People v. Mickle* (1991) 54 Cal.3d 140, 172; *People v. Collins* (1986) 42 Cal.3d 378, 387-389; *People v. Foreman* (1985) 174 Cal.App.3d 175, 179-182.) Thus, a ruling refusing to permit impeachment with a prior conviction is reviewed for abuse of discretion. (Cal. Const., art. I, § 28, subd. (f); *Castro, supra*, 38 Cal.3d at p. 306; *People v. Gordon* (1990) 50 Cal.3d 1223, 1239; *People v. Dewey* (1996) 42 Cal.App.4th 216, 220; *People v Stewart* (1985) 171 Cal.App.3d 59, 65.)

Under section 352, a trial court may in its discretion exclude material evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create a substantial danger of undue prejudice, confusion of the issues, or misleading the jury. The weighing process under section 352 depends upon the trial court's consideration of the

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[14] The Supreme Court has defined "moral turpitude" as a "'readiness to do evil,'" or "any character trait which can reasonably be characterized as 'immoral.'" (*Castro, supra*, 38 Cal.3d at pp. 314-317, & fn. 13.)

unique facts and issues of each case, rather than upon the mechanical application of automatic rules. (*Stewart*, *supra*, 171 Cal.App.3d at p. 65; *People v. Yu* (1983) 143 Cal.App.3d 358, 377.) We will not overturn or disturb a trial court's exercise of its discretion under section 352 in the absence of manifest abuse, upon a finding that its decision was palpably arbitrary, capricious and patently absurd. (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1124-1125; *People v. Robbins* (1988) 45 Cal.3d 867, 880-881; *People v. Adams* (1980) 101 Cal.App.3d 791, 799; *People v. Cordova* (1979) 97 Cal.App.3d 665, 670.) "The [trial] court's exercise of discretion under Evidence Code section 352 will not be disturbed on appeal unless the court clearly abused its discretion, e.g., when the prejudicial effect of the evidence clearly outweighed its probative value." (*People v. Brown* (1993) 17 Cal.App.4th 1389, 1396.)

There was no abuse of discretion in this case. The trial court was clearly entitled to make a discretionary determination on the admissibility of Hurtz's prior felony convictions under section 352. As appellant points out, the trial court simply ruled that the nature of the crimes of which Hartz had been convicted was irrelevant; it did not explicitly base its ruling barring admission of this evidence on a section 352 analysis. However, in stating that the evidence was "irrelevant," the court essentially made a dispositive determination for section 352 purposes, since evidence that is irrelevant cannot be probative, without regard to any question of prejudice. Hurtz's prior felony convictions were relevant to *impeach* his *credibility* as a *witness* only, *not* to prove his prior conduct. (*Castro*, *supra*, 38 Cal.3d at pp. 306, 312-316, 322-323; *Stewart*, *supra*, 171 Cal.App.3d at pp. 63-66.) It is patently clear from

appellant's defense strategy at trial as well as his arguments on appeal that his purpose was to convince the jury that, given his drug convictions, Hurtz was probably involved in drug trafficking in 1992. Such an inference in [sic] beyond the scope of impeachment for credibility purposes. For this reason, the trial court's decision not to permit the admission of this evidence did not exceed the bounds of reason. (*Sandoval*, *supra*, 4 Cal.3d at p. 178; *People v. Massey* (1987) 192 Cal.App.3d 819, 825; *Stewart*, *supra*, 171 Cal.App.3d at p. 65.)

Appellant also urges that the precise nature of Hurtz's prior convictions was admissible to impeach his testimony that his only source of income was his employment as a concrete worker and denying that he sold drugs. In fact, Hurtz testified that he made "most" of his money from construction work; he never actually denied selling drugs. Given the lack of such direct testimony, Hertz's drug convictions were not relevant to impeach his testimony, and the trial court's discretionary decision sanitizing his testimony was not unreasonable.[15] (*People v. Clair* (1992) 2 Cal.4th 629, 655.)

## VI. Exclusion of Evidence of Borelli's Alleged Conduct

Next, appellant contends the trial court erred by preventing the defense from presenting certain evidence in

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[15] In any event, given the substantial evidence supporting appellant's guilt and Hurtz's admission that he had been convicted of an unnamed felony, it is not reasonably probable that permitting the defense to establish that Hurtz had been convicted of selling drugs would not have tipped the balance in this case in favor of acquittal. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

support of its third party culpability theory, to the effect that Borelli had engaged in conduct "similar" to that involved in this case. Once again, the contention is meritless.

### *PROCEDURAL BACKGROUND*

At issue is appellant's attempt to convince the jury that the Bells' murders were ordered or instigated by Borelli and performed by persons other than appellant, through the introduction of evidence to the effect that various allegedly "independent" witnesses had heard Borelli (a) complain victim Cynthia Bell owed him a drug debt, (b) state "he wanted her taken care of," and (c) subsequently admit having ordered the Bells' murder. In support of this theory, appellant sought to introduce alleged "character" evidence to the effect that, on various other occasions, Borelli had asked people to "take care of" *other* individuals with whom he was having difficulties.

Thus, appellant moved in limine to permit the introduction of testimony regarding three alleged incidents supposedly "similar" to the Bells' murders. In the first alleged incident, Bernal allegedly asked Vergos to "take care of" Debra Neundorf for Borelli. Vergos refused. Borelli then asked Neundorf to meet him "in a somewhat isolated location" on the side of a road just off Interstate 505. There, Borelli and Neundorf had an angry conversation. Borelli pulled out a gun and fired three times, shouting "'you need to be like George, dead.'" Neundorf was able to avoid the shots, and Borelli "sped off." In the second alleged incident, Bernal approached appellant and asked him to "get rid of a guy named Rick for Borelli." Appellant refused, but later confronted Borelli, "who

confirmed that he wanted Rick harmed." In the third alleged incident, Bernal confided to Murphy that he and Borelli had planned "to get rid of" appellant. Bernal offered to introduce Murphy to the people who were to commit the homicide, but Murphy refused.

During the colloquy with the trial court concerning this motion, the trial court pointed out that all of the testimony concerning the incidents was hearsay and asked, "How am I going to get those in?" The trial court then denied the motion in limine *without prejudice*, expressly in order to permit defense counsel to renew the motion when seeking to introduce the testimony during trial. However, appellant did not attempt to introduce this evidence again.

### *EVIDENCE OF ALLEGED PRIOR MISCONDUCT TO PROVE THIRD-PARTY CULPABILITY*

The fact that an individual may have committed other offenses in the past may be evidence of his or her bad character, or propensity or disposition to commit the crime charged. As a general rule, evidence of a person's character or character trait, whether in the form of an opinion, reputation, or specific instances of conduct, is inadmissible when offered to prove that person's conduct on a given occasion. (Evid. Code, § 1101, subd. (a).) If evidence of prior misconduct, bad acts or offenses is offered only for this purpose, it must be excluded. (*People v. Thompson* (1980) 27 Cal.3d 303. 316-317; *People v. Basket* (1965) 237 Cal.App 2d 712, 715, overruled on other grounds in *People v. Kelley* (1967) 66 Cal.2d 232, 243, fn. 5; 1 Witkin, Cal. Evidence (3d ed. 1986) Circumstantial Evidence, § 356, pp. 325-326.)

However, where the purpose of introducing evidence of other crimes, uncharged offenses or prior bad acts is not to show bad character or a disposition to commit a crime, but instead is to establish some other independent material fact in issue in the case, the evidence may be admissible for that particular limited purpose. (Evid. Code, § 1101, subd. (b); *People v. Haslouer* (1978) 79 Cal.App.3d 818, 825; 1 Witkin, Cal. Evidence, *supra*, Circumstantial Evidence, § 357, pp. 326-328.) Thus, among other things, evidence of prior misconduct is admissible if relevant to prove identity, opportunity, intent, or common design, method, scheme or plan. (Evid. Code, § 1101, subd. (b); *People v. Balcom* (1994) 7 Cal.4th 414, 422; *People v. Ewoldt* (1994) 7 Cal.4th 380, 399-402; *Haslouer*, *supra*, 79 Cal.App.3d at p. 825; CALJIC No. 2.50 (1994 rev.) (5th ed. supp.); 1 Witkin, Cal. Evidence, *supra*, Circumstantial Evidence, § 357, pp. 326-328.) This analysis also applies to "proposed evidence regarding prior criminal conduct of a third party alleged to have committed the charged offense." (*People v. Davis* (1995) 10 Cal.4th 463, 501.) In such a case, the proffered third party culpability evidence must "show a fact other than the third party's criminal disposition, such as motive or intent," or else it "does not amount to direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Ibid.*)

Appellant now contends the trial court prejudicially erred in limiting his right to present a defense based on third party culpability by introducing evidence of alleged prior similar conduct under Evidence Code section 1101. According to appellant, the evidence of Borelli's alleged acts and behavior with regard to persons other than the victims in this case was admissible as relevant to prove a

common scheme, design or plan. (Evid. Code, § 1101, subd. (b); *Balcom*, *supra*, 7 Cal.4th at p. 422; *Ewald*, *supra*, 7 Cal.4th at pp. 399-402; *Haslouer*, *supra*, 79 Cal.App.3d at p. 825; CALJIC No. 2.50 (1994 rev.) (5th ed. supp.); 1 Witkin, Cal. Evidence, *supra*, Circumstantial Evidence, § 357, pp. 326-328.)

Evidence of an individual's previous uncharged misconduct may be relevant and admissible where the uncharged misconduct and the charged offense share sufficient common features to support the inference that they are both manifestations of a common design or plan. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 401, 403.) In determining whether evidence of the uncharged prior misconduct is relevant to demonstrate a common design, method or plan, the court must consider the nature and degree of similarity between the uncharged misconduct and the charged offense. (*Id.* at p. 402.) The degree of similarity required to establish a common design, method, scheme or plan is greater than that required to prove intent, but less than the high degree of similarity required to prove identity. (*Id.* at pp. 402-403.) In order to establish a common design or plan, the evidence of prior uncharged misconduct must demonstrate not just a mere similarity in results, but such a "'concurrence of common features'" that the various events are naturally explained as the individual manifestations of a general design, method, scheme or plan rather than merely a series of similar spontaneous acts. (*Id.* at p. 402.)

The Supreme Court in *Ewoldt* requires a two-step analysis before prior uncharged offenses are admitted in a subsequent trial on charges of similar offenses: the initial analysis under Evidence Code section 1101; and an additional analysis under Evidence Code section 352 to determine whether the probative value of the uncharged prior

offenses was substantial enough to outweigh the prejudice inherent in all such evidence. (*Ewoldt, supra*, 7 Cal.4th at pp. 404-407.) It is not necessary that the trial court specifically mention Evidence Code section 352 in making this analysis, although it is better practice to do so. What is essential is that the record show the trial court in fact weighed prejudice against probative value. (*People v. Zapien* (1993) 4 Cal.4th 929, 960; *People v. Heishman* (1988) 45 Cal.3d 147, 170.) This determination is committed to the sound discretion of the trial court, and will not be reversed on appeal absent a clear abuse of discretion. (*People v. DeRango* (1981) 115 Cal.App.3d 583, 589-590.)

The underlying inference supporting the admission of prior bad act evidence is that, if the individual committed the former act and did so in a particular fashion, he or she must also have committed the charged crime, in the same way or with the same intent. (*People v. Diaz* (1992) 3 Cal.4th 495, 561-562; *Robbins, supra*, 45 Cal.3d at p. 879; *People v. Wade* (1988) 44 Cal.3d 975, 990; *Thompson, supra*, 27 Cal.3d at p. 315; *Haslouer, supra*, 79 Cal.App.3d at pp. 827-828.) No matter for which purpose the prior act evidence is admitted – whether to show "identity," "intent," or the existence of a "common scheme or plan" pursuant to which the charged act allegedly occurred – the essential foundational premise for admission of the uncharged acts is that *the alleged acts were actually committed by the individual in the first place*. Unless this fundamental precondition is met, evidence of uncharged acts can have no materiality to the charged offense, and cannot form the basis for any reasonable inferences about the individual's intent, plan, or identity as the perpetrator. (*People v. Albertson* (1944) 23 Cal.2d 550, 576-581; *People v. Martinez* (1992) 10 Cal.App.4th 1001, 1006-1008; *People v.*

*Dellinger* (1984) 163 Cal.App.3d 284, 298-300; *People v. Long* (1970) 7 Cal.App.3d 586, 590; *People v. Jackson* (1967) 254 Cal.App.2d 655, 658-660.)

### *DISCUSSION: APPELLANT'S PROFFERED EVIDENCE WAS INADMISSIBLE*

The short answer to appellant's contention that the trial court erred in not permitting him to introduce the subject "evidence" in this instance is that there was no competent evidence to be admitted. Even if relevant, hearsay evidence is inadmissible except as provided by law. (Evid. Code. § 1200, subd. (b).) Appellant never responded to the trial court's expressed concern that the entirety of the proffered testimony constituted inadmissible hearsay. Certainly, he did not establish that it came within any particular exception to the hearsay rule. As the proponent of this evidence, appellant bore the burden of establishing the necessary foundation for its admission. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1177.) We will not assume error in the absence of any record affirmatively supporting such a foundation. Having failed to proffer competent, admissible evidence that Borelli had *actually engaged in* the supposedly "similar" prior acts or that any of these alleged incidents *actually occurred*, appellant cannot possibly assert error in the trial court's refusal to admit this testimony under Evidence Code 1101. (Evid. Code, § 354; *Ramos*, *supra*, 15 Cal.4th at pp. 1177-1178.)[16]

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[16] For example, appellant has never offered *any* evidence to support his assertions about Borelli's alleged attempts to shoot Neundorf during an argument with her on a side road off Interstate 505. As appellant concedes, Neundorf herself *denied* that Borelli ever threatened her or

(Continued on following page)

## VII. Admission of Evidence of Appellant's Behavior Toward Murphy

In a corollary to the preceding argument, appellant urges that because his proffered "bad acts" evidence against Borelli was excluded, the trial court should also have excluded the evidence of appellant's threatening behavior toward Murphy. There is no merit to the contention.

The crucial difference between the two situations is both obvious and determinative. As seen, there was no competent evidence proffered concerning Borelli's alleged prior threats or misdeeds against third persons. On the other hand, Murphy herself testified at length about how appellant took her for a long drive along deserted country backroads, stopped his pickup truck in an isolated location, threatened her life over a drug and money dispute, fired his .357-magnum out of the window, and told her he "was going to get to the bottom of this." Murphy's direct testimony about appellant's words and actions toward her indisputably distinguishes this incident from those alleged by appellant of Borelli.

By the same token, there is no question the evidence of appellant's behavior toward Murphy was admissible to prove motive, opportunity, intent, preparation, plan, knowledge and potential identity. The incident evidenced appellant's practice of using his gun to threaten people over drug and money disputes, his method of going to an

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that she was afraid of him. Appellant does not suggest what sort of competent evidence could contradict the testimony of the only two people purportedly present at the alleged incident. Similar difficulties exist with respect to the hearsay evidence regarding the other two allegedly "similar" incidents.

isolated spot to do so, and his stated desire and intent to kill those who he perceived as cheating him. This incident, occurring only two days before the subject murders, clearly demonstrates motive, plan, intent and identity. T ıere was no error or abuse of discretion in admitting this e ıidence.

## VIII. Exclusion of Testimony of Defense Witness Maples

Appellant argues the trial court denied him his constitutional right to present a defense and to a fair trial by excluding the testimony of defense witness Pamela Maples to the effect that she overheard Hurtz confess to two killings committed under circumstances similar or matching those of the murders at issue in this case. To the contrary, the record demonstrates there was no error or violation of appellant's constitutional rights.

### *Factual and Procedural Background*

Defense witness Pamela Marie Maples testified that Hurtz was her cousin. According to Maples, while at her sister's house in Vallejo in April 1994 she "overheard" Hurtz discussing some homicides. After the trial court sustained the prosecution's objection to the admission of Maples' testimony as to what she heard Hurtz say, the defense made an offer of proof that Maples overheard him say he had killed a man and a woman in a car in Vacaville, and was covered with blood as a result.

Under questioning outside the presence of the jury, Maples testified that she was present with her sister, Hurtz, and "a guy named Steve" at a conversation in which Hurtz allegedly said he had killed a man and a woman in a car. Maples was "in and out of the room" at

the time, only heard "bits and pieces" of the conversation, and never joined in it. The conversation was already underway when she came in; she did not know how long they had been discussing the murders, the context of the discussion, or whether it was "serious" or not. Nevertheless, Maples testified that Hurtz said he shot "[t]he girl" "[i]n the head" first, and "[t]hen he reached over and shot the guy." Hurtz said they were in a parking place, but did not otherwise describe the locale of the murders or the type of car the victims were in. Afterward, according to Maples' version of what Hurtz said, "he was full of blood" and "ran through a field, threw mud up on himself, and then went to make the phone call for somebody to pick him up." Maples "didn't hear" Hurtz say when the murders took place. Under cross-examination, she acknowledged that she had no idea whether the murders took place one week or 10 years before the conversation, or whether they took place in California or somewhere else.

The trial court sustained the prosecution objection, stating the defense had failed to establish sufficient foundation to permit Maples to testify as to the alleged statements of Hurtz, because there was insufficient evidence to connect the details of the incident allegedly described by Hurtz to the facts of the murders at issue in this case.

### *Applicable Law*

A criminal defendant has the right to present evidence of third party culpability if it is capable of raising a reasonable doubt about the defendant's own guilt. (*People v. Hall* (1986) 41 Cal.3d 826, 833; *People v. Von Villas* (1992) 10 Cal.App.4th 201, 264.) However, a trial court is not

required to permit the admission of *any* evidence, however remote, to show a third party's culpability. "[T]here must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Hall, supra*, 41 Cal.3d at p. 833; see also *People v. Clark* (1992) 3 Cal.4th 41, 131; *Sandoval, supra*, 4 Cal.4th at p. 176.)

The mere possibility that some third person committed the crime is not enough. In order to place reasonable limits on the trial of collateral issues and avoid undue prejudice to the People from unsupported jury speculation on the possible guilt of other suspects, there must be some competent and substantial proof of a *probability* that this actually happened. (*People v. Green* (1980) 27 Cal.3d 1, 22, overruled on other grounds in *Hall, supra*, 41 Cal.3d at p. 834, fn. 3; *People v. Perry* (1980) 104 Cal.App.3d 268, 272; *People v. Whitney* (1978) 76 Cal.App.3d 863, 869-870.) Even if a defendant's evidence is found to raise a reasonable doubt, the evidence may still be excluded in the discretion of the trial court if its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion of the issues. (§ 352; *Hall, supra*, 41 Cal.3d at pp. 829, 834; *Von Villas, supra*, 10 Cal.App.4th at p. 265.) An appellate court should not disturb the trial court's exercise of its wide discretion in making this determination unless there has been a manifest abuse of discretion resulting in a miscarriage of justice. (*People v. Milner* (1988) 45 Cal.3d 227, 239; *People v. Harlan* (1990) 222 Cal.App.3d 439, 446.)

### *Discussion: No Abuse of Discretion*

The trial court did not abuse its discretion in excluding Maples' testimony in this case. Even if her testimony

was fully credited, there was simply insufficient evidence to connect the murders she heard Hurtz describe, with the ones at issue here. Although Hurtz allegedly said he shot a man and a woman sitting in a car in a "parking place," Maples did not know when or where the killing occurred, or even if Hurtz was seriously describing an act he had himself committed. There was no mention of Cynthia or James Bell, and indeed no identification of the alleged victims' of Hurtz's murders at all.

Given the absence of any actual linkage to the charged offenses, or any other evidence supporting an inference that the killings allegedly described by Hurtz were those of Cynthia and James Bell, Maples' testimony simply did not tend to show appellant's innocence. In view of the total lack of identifying information linking the alleged uncharged offense and the charged crimes, the evidence was insufficient to raise a reasonable doubt. The trial court's ruling was an appropriate exercise of its discretion under section 352. (*Davis*, *supra*, 10 Cal.4th at p. 502; *Pride*, *supra*, 3 Cal.4th at p. 238; *Clark*, *supra*, 3 Cal.4th at pp. 132-133; *Von Villas*, *supra*, 10 Cal.App.4th at pp. 266, 267)[17]

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[17] At any rate, no possible prejudice could have occurred to appellant as a result of the exclusion of Maple's testimony. As seen, the trial court had already permitted appellant to introduce the very similar testimony of both Harmina Ross and Eliane West regarding Hurtz's alleged confessions of shooting two unidentified people at close range while the victims were sitting in a parked car near Vacaville. Maple's testimony to similar effect was merely cumulative.

## IX. EXCLUSION OF IMPEACHMENT EVIDENCE AGAINST NEUNDORF

Appellant next contends the trial court erred in refusing to allow him to impeach the stipulated testimony of his own defense witness Debra Neundorf by means of alleged prior inconsistent statements and statements against penal interest. Although we believe the trial court erred in its analysis of the question whether Neundorf's alleged out-of-court statements were made against her penal interest, we conclude that any possible error in denying their admission was not prejudicial.

### *PROCEDURAL BACKGROUND*

Debra Neundorf was called as a defense witness at both of appellant's prior trials. The defense was unable to call her in person as a witness at this trial because she was declared unavailable, having invoked her Fifth Amendment rights due to an arrest prior to trial. The parties therefore stipulated that her testimony from the second trial could be read into evidence. Pursuant to this stipulation, Neundorf's direct, cross, redirect and recross examinations from the prior trial were all read into the record. In that testimony, Neundorf testified that although she had previously dated Borelli, she was not dating him in October 1992; she never sold drugs to Cynthia Bell on Borelli's behalf; she never heard Borelli make threats against the Bells; Borelli never told her he was responsible for the Bells' murders or that he had the murder weapon; Borelli had never threatened her to dissuade her from testifying; and she was not afraid of Borelli. Appellant also questioned Neundorf on whether she had told defense investigator McClellan she was dating Borelli in October 1992.

Several days after Neundorf's previous trial testimony was read into the record, defense counsel called one Robert Morse to impeach Neundorf with new testimony that while recently in jail custody, she told Morse she had been untruthful in her prior testimony, she was very afraid of Borelli, and Borelli had told her he had the murder weapon. The prosecutor objected on the grounds Morse's testimony about Neundorf's alleged recent statements was hearsay offered for proof of the facts asserted; Neundorf was unavailable to be cross-examined about her conversation with Morse; and, because the recent statements to Morse were made long after Neundorf's earlier trial testimony, she necessarily could not have been examined at that time so as to give her an opportunity to explain or deny her alleged subsequent statements. The trial court announced it would sustain the objection unless the defense could establish some legal right to present the new testimony.[18]

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[18] The following colloquy took place: "MR. KEALY [the prosecutor]: She's not available for cross-examination on these. The Court has declared her unavailable as a witness. I don't know whether she's going to come in and say I never talked to Mr. Morse about this. She's never been asked, did you tell Mr. Morse these things.

"THE COURT: Okay. I'm going to sustain the objection subject to if you can find me some law. But my feeling is we declared her to be unavailable. Now, she's testified by way of stipulation from her prior trial, and I think you're stuck with that. If you have some law that says otherwise, give it to me. We'll address it. . . .

"MR. KEALY: Your Honor, if I may, just because counsel has some case –

"MS. VOSS [defense counsel]: I don't understand the grounds for sustaining it. It's impeachment. Just because she's unavailable – she wasn't unavailable when this, uh, conversation took place. Um, she said it, and she was cross-examined as to these matters.

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At a further hearing on the matter the next day, defense counsel argued Morse's testimony should be admitted on two grounds: (1) because during her previously transcribed testimony at the earlier trial Neundorf was cross-examined on similar statements concerning Borelli she allegedly made to a different defense investigator, the defense had already satisfied any confrontation requirements for the admission of her subsequent statements to Morse as prior inconsistent statements; and (2) Neundorf's alleged statements to Morse that she had been untruthful in her trial testimony were separately admissible as declarations against penal interest. The prosecutor responded that Neundorf had only been cross-examined about her earlier alleged statements to defense investigator McClellan, and had not had the opportunity to be confronted with her alleged statements to Morse. The trial court noted that "the real question" was the "fundamental fairness" of permitting one side to stipulate to the previous testimony of a witness, and then contradict that testimony with hearsay statements made after the fact while the witness was unavailable to testify.

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"MR. KEALY: There's been no testimony cross-examined as to anything she told Mr. Morse. We read her testimony in a couple weeks ago. Apparently, if I'm right, this happened with Mr. Morse within the last week?

"THE WITNESS [Morse]: Yes.

"MR. KEALY: The last couple of days?

"THE WITNESS: Last few days. But she was cross-examined on these matters, and she said something different. This is impeachment.

"THE COURT: No, that wouldn't be fair. In other words, you read in the testimony and then you go investigate, get something different. She's not around, and how can the other side, whether it was one way or the other, . . . confront the witness? That's the real problem."

The trial court ultimately sustained the objection, concluding that the prior inconsistent statement exception to the hearsay rule "applies only when the person whose statement is being used is a witness and has an opportunity to explain or to deny the statement." The court also noted that the hearsay statements sought to be admitted were made subsequent to her testimony, and were therefore not "prior" inconsistent statements. With respect to the question of whether they were admissible as against Neundorf's penal interest, the trial court found that Neundorf's alleged admission that she was "untruthful" in her previous trial testimony lacked any evidentiary value because it could not be ascertained whether or not the subject as to which she allegedly stated she had not told the truth constituted a "material fact."[19]

### *Applicable Legal Principles*

The hearsay rule bars admission of any "evidence of a statement that was made other than by a witness while testifying at the hearing," when "offered to prove the truth of the matter stated." (Evid. Code, § 1200.) One of the specific exceptions to the hearsay rule is set out in Evidence Code section 1230 for statements "so far contrary" to the declarant's personal interests "that a reasonable [person] in his [or her] position would not have made the

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[19] The trial court stated: "Now she [Neundorf] makes a statement, according to Mr. Morse that he overheard, that ['] when I testified I wasn't telling the truth.['] . . . [¶] I don't know if that would be to a material fact, to every fact, or to no fact, or to the way she spelled her name when she was asked how to spell her last name. And so I don't know what evidentiary value that has."

statement unless he [or she] believed it to be true."[20] "A party who maintains that an out-of-court statement is admissible under this exception as a declaration against *penal* interest must show that the declarant is unavailable, that the declaration was against the declarant's penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character. [Citation.] To determine whether the declaration passes the required threshold of trustworthiness, a trial court 'may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.] On appeal, the trial court's determination on this issue is reviewed for abuse of discretion." (*People v. Cudjo* (1993) 6 Cal.4th 585, 607, original italics.)[21]

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[20] Evidence Code section 1230 provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk or making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

[21] The other exception to the hearsay rule relevant to this case provides that statements by a witness "inconsistent with his [or her] testimony at the hearing" may be admitted if "offered in compliance with [Evidence Code] Section 770." (Evid. Code, § 1235.) Evidence Code section 770, subdivisions (a) and (b), in turn provides that, in order to admit "extrinsic evidence of a statement made by a witness that is inconsistent with any part of his [or her] testimony at the hearing," the witness must have been "so examined while testifying as to give him [or her] an opportunity to explain or deny the statement"; or else the witness must have "not been excused from giving further testimony in

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The hearsay statements sought to be introduced in this instance – Neundorf's assertions she had not told the truth during her previous trial testimony – are alleged by appellant to have been against Neundorf s penal interest because they exposed her to a charge of perjury. Perjury is defined, in relevant part, as a declaration made "willfully and contrary to . . . oath" which "states as true any material matter which he or she knows to be false." (§ 118.) The materiality of the misstatement of fact is thus an element of the offense. The test for whether a misstatement of fact was "material" is whether it might have been used to affect the proceeding in or for which it was made, or whether it could have influenced the outcome of the proceedings. (*People v. Kobrin* (1995) 11 Cal.4th 416, 420, 427; *People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1575; *People v. Pierce* (1967) 66 CaL2d 53, 61.)

### *Discussion*

Appellant places principal reliance on his argument that the hearsay statements of Neundorf to Morse were admissible as prior inconsistent statements.[22] Regardless

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the action." Under this provision, the witness must be given a "realistic opportunity" to explain or deny the alleged statement. (*People v. Garcia* (1990) 224 Cal.App.3d 297, 304.)

[22] Appellant essentially argues that because the prosecution had adequate opportunity to cross-examine Neundorf at the trial at which she gave her prior testimony, all of the testimony admitted pursuant to stipulation as prior testimony by an unavailable declarant under Evidence Code section 1291 must be treated as though Neundorf actually gave it at the present trial. Thus, appellant insists, even though her hearsay statement to Morse was actually made *after* she testified at the earlier trial, under Evidence Code section 1291 it should be considered as having been a *prior* inconsistent statement, "i.e., one made before the testimony was presented to the jury."

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of the merits of that argument, we have concluded the trial court erred in its analysis of appellant's alternative contention that Neundorf's statements to Morse should have been admitted under the exception for declarations against penal interest.

The trial court's stated reason for rejecting admission of Neundorf's alleged hearsay statements to Morse on this ground was that there was insufficient evidence the statements were material. According to the trial court, it was impossible to tell what evidentiary value Neundorf's statements had because it was unclear what she was referring to when she told Morse she did not tell the truth at the prior trial.

Because materiality is an element of the crime of perjury, the prosecution's failure to prove it is fatal to a perjury charge. What is at issue here, however, is not the merits of a perjury claim, but the application of a particular hearsay exception to the admission of proffered out-of-court statements. As in the case of other hearsay exceptions, the essence of the exception for statements against interest is the declarant's state of mind at the time of

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Acceding to appellant's argument that Neundorf was subject to cross-examination at the time she gave her testimony in the previous trial, this cannot obscure the fact her alleged statements to Morse took place long *after* that testimony. At the time of that earlier trial she *could not have been* given an opportunity to explain or deny the statements she allegedly made to Morse, simply because she had not made those statements yet. Because only the *transcript* of Neundorf's previous testimony was admitted at the trial now on appeal, she was not actually a witness "at the hearing," as required by Evidence Code section 1235. Accordingly Neundorf's alleged out-of-court statements to Morse were inadmissible under both sections 1235 and 770 of the Evidence Code. (*People v. Williams* (1976) 16 Cal.3d 663, 668-669; *People v. Hitchings* (1997) 59 Cal.App.4th 915, 920-922.)

making the subject statements. Specifically, the rationale of the exception is based on the assumption that reasonable persons would not say deleterious things about themselves if they thought doing so would be harmful to their interests. In this context, then, the question is not whether Neundorf's statements would ultimately be adjudged "material" and perjurious as a matter of law, but whether her statements could possibly expose her to a *charge* of perjury and therefore be considered contrary to her penal interest.

In this case, Neundorf purportedly admitted that she lied under oath. Even if she may ultimately have been acquitted of a perjury charge, her potential exposure to arrest, pretrial detention and criminal prosecution by itself is clearly contrary to her pecuniary interest, and certainly subjects her to the *risk* of criminal liability as well. Assuming Neundorf did lie under oath and admit that she had done so, it strains credulity to conclude she did not see herself at risk because she somehow had enough knowledge of criminal law to realize both that materiality was an element of the crime of perjury, and that no court would find her lies "material."

We conclude that a reasonable person in Neundorf's position would have thought of her admission of lying under oath as being against her interests, and her out-of-court statements therefore qualified for admission under that exception to the hearsay rule. Even so, the trial court could still have excluded the statements if it determined they were not sufficiently reliable or trustworthy. (*People v. Cudjo, supra*, 6 Cal.4th at pp. 607-609; *People v. Frierson* (1991) 53 Cal.3d 730, 745.) Here, it does not appear the trial court made such a factual determination. We are loath to do so in the first instance on this appeal. Assuming the

statements were sufficiently reliable, we therefore assume further that their exclusion was error.

That error, however, does not compel reversal; the question of prejudice remains. Assuming the trial court abused its discretion in barring the admission of this testimony, we may not reverse or set aside the judgment unless, in light of the entire record, we conclude the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) We cannot so conclude in this case.

The body of evidence against appellant was extensive and compelling, as we have set out in some detail. Numerous witnesses testified appellant not only threatened the lives of the victims on several occasions during the days just before the killings, but he also acknowledged committing the murders soon afterward. At least one of the murder bullets was identified as having been fired from appellant's gun. Several witnesses saw that gun in appellant's possession both immediately before and immediately after the murders. Other than Neundorf's hearsay statement to Morse that Borelli told her he had the murder weapon, there was *no other evidence* Borelli ever had possession or control of the gun used to kill the victims. Even accepting Borelli's alleged statement to Neundorf at face value, there is nothing to indicate *when* he might have had possession of the gun, or what the circumstances of his possession were. Indeed, whether or not Borelli said he had possession of the murder weapon, nothing in appellant's proffer suggests he ever admitted committing the murders.

Finally, Neundorf's reported statements to Morse had obvious indicia of unreliability. Not only were Neundorf's statements hearsay, but they were themselves chiefly

concerned with alleged double hearsay statements by Borelli concerning his supposed possession of the murder weapon. Appellant's main reason for seeking admission of this double hearsay was as proof of the facts asserted. Thus, the reliability of *both* Neundorf and Borelli himself was placed in issue by Morse's proffered testimony. The testimony consists of jailhouse assertions that the declarant lied under oath during her previous testimony, which assertions the defense now seeks to admit as the truth without any chance for testing by cross-examination. Given her incarceration, Neundorf's motives for making the supposed admissions are certainly suspect. Under all these circumstances, there is only a remote chance a reasonable jury would have given substantial weight either to Neundorf's hearsay statements to Morse, or to the double hearsay statements of Borelli that Neundorf reportedly recounted. On this record, we conclude it is not reasonably probable that a result more favorable to appellant would have occurred in the absence of the trial court's error in articulating its reasons for denying admission of this evidence. (Cal. Const., art. VI, § 13; *Cudjo, supra*, 6 Cal.4th at pp. 612-614; *People v. Watson* (1956) 46 Cal.2d 818, 836.)[23]

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[23] In his reply brief, appellant for the first time argues that even if the statements allegedly made by Neundorf to Morse were inadmissible to prove their truth, they should have been admitted as impeachment evidence under Evidence Code section 1202. In the first place, appellant may not raise this argument for the first time in his reply brief. It is an established rule that points raised for the first time on appeal in a reply brief will ordinarily not be considered, in the absence of a showing of a good reason for the failure to present them earlier. To do so would deprive the respondent of an opportunity to counter the argument. Because appellant failed without good cause to raise this contention until his reply brief, we reject it. (*Reichardt v. Hoffman* (1997) 52

(Continued on following page)

## X. ADMISSION OF ALLEGEDLY "COERCED" TESTIMONY

Appellant argues the trial court erred by permitting the testimony of prosecution witnesses Edgar Fry, Debbie Mathies and Shannon Nissen to be admitted because it was allegedly "coerced" by the law enforcement authorities. In support, appellant points to evidence that each of these witnesses originally told the police that appellant was not involved in the murders, and did not begin to cooperate "until their own personal interests required them to implicate him."

This argument fails. When appellant first raised it at trial, the trial court reviewed all the transcripts provided by defense counsel of the witnesses' prior testimony at appellant's earlier trials. The trial court noted that although the police informed the witnesses they could be charged as accessories in connection with this case, there was also evidence the police pressed them only to "tell the truth." The trial court concluded that although there were certainly evidentiary questions going to the credibility of these witnesses, there simply was insufficient evidence they had been coerced to bar their testimony from admission altogether.

A defendant has only a limited right to exclude the testimony of third parties on the ground that it was coerced. In any motion to exclude the testimony of a third party witness on grounds of coercion, the defendant bears

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Cal.App.4th 754, 764-765; *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 616, pp. 647-648; 6 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Appeal, § 3250, pp. 4015-4017.) In any event, as already discussed, any error in failing to admit this evidence was harmless.

the burden of proving that (a) the witness was improperly coerced; and (b) the reliability of the witness's testimony was actually impaired by the coercion. (*People v. Badgett* (1995) 10 Cal.4th 330, 346-350; *People v. Douglas* (1990) 50 Cal.3d 468, 500.) Although the claim that a witness's statement to the police was involuntary is subject to independent review on appeal, when faced with conflicting testimony in the record a reviewing court must accept the version of the event most favorable to the People. (*Badgett*, *supra*, 10 Cal.4th at pp. 350-352; *People v. Howard* (1988) 44 Cal.3d 375, 394.)

The record in this case fully supports the trial court's determination. The jury heard both the initial versions of the facts given to the police by Nissen, Mathies and Edgar Fry, and their subsequent statements inculpating appellant. All three witnesses acknowledged they knew of their exposure to charges relating to drugs or complicity in the facts of this case, but specifically denied being subject to police threats, pressure or coercion to say anything other than the truth. There is nothing inherently coercive about confronting a suspect with the legal predicament he or she is in, or with an offer to release from custody or refrain from prosecuting the suspect in return for his or her cooperation with a police investigation. (*Badger*, *supra*, 10 Cal.4th p. 355; *Douglas*, *supra*, 50 Cal.3d at p. 502, fn. 7.) Nothing more coercive than that occurred in this case. Ultimately, the question was one of credibility. The jury had before it all of the relevant evidence, and was in the best position to judge the credibility of these witnesses. There was no error.

## XI. Restriction of Cross-Examination of Edgar Fry

Finally, appellant maintains the trial court improperly restricted his cross-examination of prosecution witness Edgar Fry, thereby allegedly denying appellant's constitutional rights to confront and cross-examine the witnesses against him. As in the case of his other arguments, appellant is wrong.

Appellant asserts the trial court prohibited from "fully exploring" four "areas related to Edgar's credibility": (1) the threats allegedly made to him by the police; (2) problems in Edgar's relationship with appellant; (3) questions about Edgar's state of mind at the time of the murders, including his alleged depression, drinking and drug abuse problems; and (4) questions about whether Edgar obtained the factual information to which he testified from his own personal knowledge or from the police. According to appellant, the trial court improperly "restricted defense questioning in each of these areas. over defense objection," on the grounds "there had already been adequate testimony in those areas." Yet appellant does not provide *any specific examples* of questions he asserts were proper, but which were improperly disallowed by the trial court.

Under the Sixth Amendment of the United States Constitution, a defendant has the constitutional right to confront the witnesses against him and to cross-examine his or her accusers. Nevertheless, a trial court retains broad discretion over the conduct of trial. Included within this discretion is the power to impose reasonable limits on cross-examination, in order to preclude repetitive, confusing, and unduly harassing interrogation. Thus, the Confrontation Clause simply guarantees an *opportunity* for

effective cross-examination; it does not guarantee an opportunity to cross-examine in whatever way, and to whatever extent, the defense might wish. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679-680; *Davis v. Alaska* (1974) 415 U.S. 308, 315-316.) As long as the cross-examiner has the opportunity to place the witness in his or her proper light, and to put the weight of the witness's testimony and credibility to a reasonable test which allows the jury fairly to appraise it, the trial court may permissibly limit cross-examination to prevent undue harassment, expenditure of time, or confusion of the issues. (*Davis v. Alaska*, *supra*, 415 U.S. at p. 318; *Evans v. Lewis* (9th Cir. 1988) 855 F.2d 631, 634; *Steele v. Perez* (7th Cir. 1987) 827 F.2d 190, 193-194.)

Appellant's failure to cite *any* examples of questions he contends the trial court should have permitted him to ask Edgar Fry is fatal to his present argument. Contrary to appellant's vague assertion of improper restrictions on his cross-examination of Edgar, the record actually shows defense counsel was given ample opportunity to inquire into all of the subjects he cites in his brief on appeal. Thus, the trial court permitted defense counsel to question Edgar on his state of mind and usage of drugs and alcohol around the time of the murders. Under cross-examination, Edgar conceded he was depressed about his separation from his wife, and had been using drugs and alcohol. Defense counsel also questioned Edgar at great length about the supposed threats made to him by the police. Similarly, defense counsel cross-examined Edgar concerning his relationship with his brother with repeated questioning about whether they had a "good" relationship, how much time Edgar spent at appellant's house, whether the two "clicked," whether Edgar told the police he did not

"give a 'F' about" appellant, and whether Edgar ever called appellant "a kick in the dirt as far as I'm concerned." Finally, defense counsel was permitted to question Edgar at length about whether the information to which he testified "originated" with the police as opposed to his own personal experience and observation.

On this record, appellant has utterly failed to establish that any unconstitutional restrictions were placed on his cross-examination of Edgar. To the contrary, the record demonstrates that, as to every subject now cited by appellant as an example of one on which his cross-examination of Edgar was unduly restricted, he actually asked many probing questions and was barely restricted in his cross-examination at all.

## XII. DISPOSITION

The judgment is affirmed.

McGuiness, P.J.

We concur:

Corrigan, J.

Parrilli, J.

Court of Appeal, First Appellate District, Division Three –
No. A072396
**S088166**

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

(Filed Jul. 12, 2000)

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THE PEOPLE, Respondent,

v.

JOHN FRANCIS FRY, Appellant.

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Petition for review DENIED.

GEORGE
Chief Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN FRANCIS FRY,
Petitioner,

vs.

CHERYL PLILER, Warden,
Respondent. /

No. CIV S-01-1580 FCD GGH P

FINDINGS & RECOMMENDATIONS

(Filed Jun. 2, 2004)

## I. INTRODUCTION

It should not be surprising that in a case where it took no less than *three* trials to convict petitioner, with deliberations in the third trial taking *five weeks,* that the present habeas action would present complicated issues which necessitate a lengthy discussion. However, while petitioner's counsel is to be commended for his efforts with respect to his primary claims, and although petitioner comes close to demonstrating actionable error in some of his various claims, the petition ultimately falls short.

Petitioner, a state prisoner represented by counsel, is proceeding on an amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, filed on June 24, 2002.[1]

Petitioner challenges his 1995 jury trial conviction for two counts of first degree murder; the jury found true the multiple murder special circumstance and the use of a firearm. Amended Petition (AP), p. 11, Clerk's Transcript (CT) 995-97; Answer (Ans.), p. 1. Petitioner was sentenced to life without the possibility of parole plus a term of 35

[1] The original petition was filed on August 15, 2001.

years (CT 1036-37[2]). For the reasons set forth herein, the petition should be denied.

## II. ISSUES

Not even the issues are easily discerned in this action. In his amended petition, several overarching issues are raised with discrete subissues underlying those issues. However, it is less confusing in this lengthy Findings to discretely break out all the issues. The court has identified all discrete issues (as were separately set forth in the traverse) as follows:

A. Admission of character evidence (a prior criminal incident engaged in by petitioner) violated due process;

B. Admission of coerced testimony of witnesses violated due process rights of petitioner (includes "claim" that failure of court to grant evidentiary hearing on issue of coercion violated due process);

C. Petitioner's right of cross examination was unduly restricted with respect to petitioner's brother's testimony (including the area of threats made to the brother by the police);

D. Petitioner was denied his right to present a defense by exclusion of testimony of a witness who overheard a third party confession (Hurtz) to the murders;

E. Petitioner was denied his right to present a defense when the trial court excluded the prior convictions of the "actual killer" (Hurtz);

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[2] Pages 1018 to 1035 of the Clerk's Transcript (CT) are missing from respondent's submission to the court.

F. Petitioner was denied his right to present a defense when the trial court excluded evidence of a third party's possession of the murder weapon (actually – evidence that would have impeached a witness that testified the third party did *not* have possession of the weapon);

G. Petitioner was denied his right to present a defense when the trial court excluded the prior acts of violence of the "actual killer's" accomplice;

H. Petitioner's Sixth Amendment and due process rights were violated when the trial judge directed the jurors to continue deliberating after they had announced a deadlock on the ninth day of deliberation;

I. Petitioner's Sixth Amendment and due process rights were violated when the testimony was read back in a misleading fashion.

## III. EXHAUSTION

Review of the merits is delayed by one exhaustion issue. Although there is no question that the coerced testimony of witnesses claim (Issue B, above) was exhausted on its merits, respondent asserts that the subclaim – petitioner's due process rights were violated by the trial court's failing to hold an evidentiary hearing on his coerced testimony allegations – was not exhausted. The court need not determine the exhaustion question because it is clear that the subclaim does not set forth a claim cognizable in federal habeas corpus.

Whether the state trial court held an evidentiary hearing on an evidence preclusion issue (thereby fairly and accurately finding the facts relevant to a ruling on the merits) is only pertinent to the *federal procedural* habeas

issues concerning the use of any factual presumption of correctness, 28 U.S.C. § 2254(e)(1) and/or the need for an evidentiary hearing *in federal habeas*. § 2254(e)(2). There is no recognized federal constitutional claim that one has a federal due process right to state court evidentiary hearings on evidence issues. Accordingly, this subclaim should be summarily dismissed which obviates the need for an exhaustion discussion, and permits the court to reach the merits of other issues. 28 U.S.C. § 2254 (b)(2).

## IV. AEDPA

The AEDPA applies to this petition for habeas corpus which was filed after the AEDPA became effective. *Neelley v. Nagle*, 138 F.3d 917 (11th Cir.), citing *Lindh v. Murphy*, 117 S. Ct. 2059 (1997). The AEDPA "worked substantial changes to the law of habeas corpus," establishing more deferential standards of review to be used by a federal habeas court in assessing a state court's adjudication of a criminal defendant's claims of constitutional error. *Moore v. Calderon*, 108 F.3d 261, 263 (9th Cir. 1997).

In *Williams (Terry) v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495 (2000), the Supreme Court defined the operative review standard set forth in § 2254(d). Justice O'Connor's opinion for Section II of the opinion constitutes the majority opinion of the court. There is a dichotomy between "contrary to" clearly established law as enunciated by the Supreme Court, and an "unreasonable application of" that law. *Id.* at 1519. "Contrary to" clearly established law applies to two situations: (1) where the state court legal conclusion is opposite that of the Supreme Court on a point of law, or (2) if the state court case is materially

indistinguishable from a Supreme Court case, i.e., on point factually, yet the legal result is opposite.

"Unreasonable application" of established law, on the other hand, applies to mixed questions of law and fact, that is, the application of law to fact where there are no factually on point Supreme Court cases which mandate the result for the precise factual scenario at issue. *Williams (Terry)*, 529 U.S. at 407-08, 120 S. Ct. at 1520-1521 (2000). It is this prong of the AEDPA standard of review which directs deference to be paid to state court decisions. While the deference is not blindly automatic, "the most important point is that an *unreasonable* application of federal law is different from an incorrect application of law. . . . [A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams (Terry)*, 529 U.S. at 410-11, 120 S. Ct. at 1522 (emphasis in original). The habeas corpus petitioner bears the burden of demonstrating the objectively unreasonable nature of the state court decision in light of controlling Supreme Court authority. *Woodford v. Viscotti*, 537 U.S. 19, 123 S. Ct. 357 (2002).

The state courts need not have cited to federal authority, or even have indicated awareness of federal authority in arriving at their decision. *Early v. Packer*, 537 U.S. 3, 123 S. Ct. 362 (2002). Nevertheless, the state decision cannot be rejected unless the decision itself is contrary to, or an unreasonable application of, established Supreme Court authority. *Id.* An unreasonable error is one in excess of even a reviewing court's perception that "clear error" has occurred. *Lockyer v. Andrade*, 538 U.S. 63, 75-76, 123

S. Ct. 1166, 1175 (2003). Moreover, the established Supreme Court authority reviewed must be a pronouncement on constitutional principles, or other controlling federal law, as opposed to a pronouncement of statutes or rules binding only on federal courts. *Early v. Packer*, 537 U.S. at 10, 123 S. Ct. at 366.

However, where the state courts have not addressed the constitutional issue in dispute in any reasoned opinion, the federal court will independently review the record in adjudication of that issue. "Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable." *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003).

## V. BACKGROUND

### A. Procedural Background

The First District Court of Appeals (division three) succinctly summarizes the convoluted procedural background of this case:

> Appellant was charged in February 1993 with three counts of first degree murder of three victims (James Bell, Cynthia Bell, and Jason Gibeau), with allegations of the special circumstance of multiple murder and of firearm use. (Pen. Code, §§ 187; 190.2, subd. (a)(3); 12022.5.)
>
> > Unless otherwise indicated, all further statutory references are to the Penal Code.
>
> In May 1993, appellant's section 995 motion to set aside the information was granted with respect to the charged murder of Gibeau.

> Appellant's first two trials resulted in mistrials due to juror deadlock.[3] Appellant's third jury trial commenced on February 24, 1995. On June 8, 1995, the jury convicted appellant of first degree murder on both counts, and found true the allegations of firearm use and multiple murder special circumstances. He was sentenced to life in prison without the possibility of parole, plus a term of 35 years.

Exhibit (Exh.) D to Answer, First District Court of Appeals unpublished opinion, March 31, 2000, p. 34.

Upon petitioner's petition for review to the California Supreme Court of the appellate court's denial of his writ application, the petition was denied on July 12, 2000. Exh. F to Answer. The original petition in this matter was filed in this court on August 15, 2001. Counsel was appointed by order filed on August 28, 2001. By order filed on October 5, 2001, petitioner was directed, if he chose to amend, to file a first amended petition within 120 days. Following several grants of requests for extension of time (*see Orders* filed on January 31, 2002, March 26, 2002, June 10, 2002, and June 17, 2002, the first amended petition was filed on June 24, 2002).

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[3] Petitioner sets forth the dates of the two prior deadlocked trials: the first jury trial on two murder counts and the multiple murder special circumstances allegation began on February 22, 1994 and was declared a mistrial on April 4, 1994. AP, p. 10, CT 222-257, 374. The second jury trial began on August 24, 1994 and concluded on October 21, 1994, when a mistrial was declared due to another deadlocked jury. AP, p. 10, CT 510-524, 530-552, 557-559, 569-570, 575-578, *664-671, 683. (*Note: pages 660-667 of the clerk's transcript do not appear to be included in the record before this court).

Petitioner had three separate jury trials before he was convicted. Amended petition (AP), p. 2, RT 5337-5338. in the first trial, the jury was deadlocked with a 6 to 6 split: six voting to acquit, six voting for conviction.[4] The second trial ended with a 7 to 5 deadlock in favor of conviction. AP, p.2, CT 664-667.[5]

The presentation of evidence in the third trial lasted eleven (11) weeks; jury deliberations went on for five (5) weeks. AP, p. 2. Numerous votes were taken with the jurors unable to reach a unanimous verdict. *Id.* There were numerous testimony readbacks requested by jurors. *Id.* Jurors advised the court at one point that they were split 7-5. AP, p. 2, RT 5154.6. Only two jurors at that time believed that a verdict could be reached. AP, pp. 2-3, 10, RT 5154.-5154.8. When the jury sought more information about the reasonable doubt standard, they were referred to the instruction they had been provided. AP, p. 3, RT 5154.9. When the trial judge told jurors to return for further deliberations, he also informed them that he would check with them again the following day but failed to do so. AP, p. 3, RT 5154.9, 5233. More than a week later, at least one juror showed concern that she would lose her job if deliberations did not come to an end; a verdict was eventually reached, finding petitioner guilty on all charges. AP, p. 3, RT 5233, 5337-5338. In Exhibit B to the amended petition, petitioner includes a letter from

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[4] According to petitioner's counsel, the reporter's transcript (RT) of the first trial contains some 1,758 pages of witness testimony; the second trial's RT contains 2,722 pages of witness testimony; the third trial, at issue here, has a RT including 5,377 pages of trial proceedings, as well as a clerk's transcript (CT) of 1048 pages. AP, pp. 3, 9 fn.18.

[5] As previously noted (*see* footnote 3), these pages are among those missing in the court transcript submitted to this court.

petitioner's trial counsel, the former (now deceased) director of the Solana County Conflict Defender's Office, Lorraine E. Voss, which petitioner asserts demonstrates his trial counsel's abiding conviction that he is innocent of the double homicide. AP, p. 3 and Exh. B.[6]

B. Factual Background

Petitioner notes that the relevant facts of the case have been extensively set forth in the state court of appeals slip (unpublished) opinion. AP, p. 12, fn 28. This court's independent review has confirmed the accuracy of the facts/record as set forth in the state appellate court decision:[7]

> Between 6:15 and 6:30 a.m., on October 27, 1992, the bodies of James and Cynthia Bell

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[6] In a March 5, 1996 letter to petitioner's appellate counsel wherein Ms. Voss turns over the case file, she concludes: "Going through this trial in front of Judge Harrison (twice) was the most awful experience of my life. I doubt if the trial transcripts in this case could truly reflect what an awful experience it was. It was only my faith in Jay Fry and his innocence that kept me going." Exh. B to AP. As Exh. E, petitioner includes trial counsel's preliminary information re: appeal, another intensely critical (also without setting forth specific factual underpinnings) assessment by Ms. Voss: "This trial was a complete nightmare both the 2nd and 3rd time. The judge for the last 2 trials was something I can't put down on paper. The two district attorneys involved were not of sterling character. In fact[, in] the last trial the district attorney's office attempted to manipulate phoney [sic] charges against defense counsel in order to win! The last trial in particular was a twilight zone experience." The record shows that Ms. Voss was commended by the trial court for her efforts in defense of petitioner (through the several trials). AP, p. 3, n. 5, RT 5346. The court notes that the prosecutor who had inherited the case was also commended. RT 5346.

[7] Petitioner's counsel also quotes from this summary. *See* AP, p. 12.

> [Footnote 1:] At various points during the trial, Cynthia Bell was also referred to as "Cynthia Edon." For consistency, throughout this opinion we will refer to the female victim in this case as Cynthia Bell.

were discovered in a white 1978 Camaro automobile parked on the dirt shoulder of Interstate 505 near the freeway intersection with VacaValley Parkway. Both victims had been shot. Cynthia's body was on the driver's side, with the window down. The victim's left arm was resting on the door sill, and her body was turned to the left as though she had been talking to someone outside the vehicle. According to witnesses who first saw the body, the upper portion of Cynthia's head was "missing." James's body was in the front passenger seat, slumped toward Cynthia's body. The car keys were in the ignition and turned to the "on" position. However, the engine was not running; the gas tank was empty, and the battery was dead. Black, sooty carbon deposits were visible directly below the tailpipe, indicating the car had been idling for some period of time at that location. There was an empty paper soft-drink cup from a Chevron minimart between James's thighs.

When police officers and paramedics arrived at the scene between 7:00 and 7:30 a.m., they found the bodies "ashen," "very cold," "very firm," and mottled or marbled in appearance. Pictures were taken of the victims' bodies and the crime scene between 8:30 and 10:00 a.m., before the bodies were moved or disturbed. By the time the coroners removed the victims from the car between 11:00 and 11:30 a.m., the bodies were totally rigid and stiff, and retained their postures when moved.

Three bullets were recovered: one from James' cheek; a second from the passenger door; and a third from the rear floor of the Camaro behind the passenger seat. Dr. Aaron Lipton, the pathologist who performed the autopsies on the victims, testified that Cynthia had sustained "massive damage" to the upper part of her face and skull, "with a large area of these areas of the face and skull absent . . . [a]nd a large portion of the brain material beneath the skull also absent." Dr. Lipton opined that the gunshot wound to Cynthia's head, which was the cause of her death, was the result of someone shooting her in the face from only inches away. Under the circumstances, the shooter "[p]ossibly" would be "covered with blood and tissue" from the victim. James had a total of eight bullet wounds on his head, chest, back and wrist; death resulted from the wounds to the head and lungs. Dr. Lipton opined that James' wounds were caused by shots fired at him from the driver's side of the car.

Based on the photographs of the victims taken after their bodies had been taken out of the Camara, Dr. Lipton opined that they appeared to be "in full rigor mortis," a condition which, in a temperate climate like that present at the time and location of the crime, usually develops "between six and twelve hours" after death and then subsides within 36 hours. Rigor mortis would manifest by a "very firm" condition of the muscles directly under the skin. At the time he performed the autopsies, beginning at approximately 8:30 a.m., on October 28, 1992, Dr. Lipton noted only "mild" or "moderate" rigor mortis remaining in the victims' bodies. On cross-examination, Dr. Lipton testified that he originally estimated the victims had died three or four hours before the

bodies were found, based on the pictures and the descriptions given by the police investigators. However, he also testified there are many different variables affecting the accuracy of any estimate of the time of death based on rigor mortis.

Several witnesses testified to having seen an older-model white Camaro, matching the description of the victim's car, parked at the crime scene between approximately 8:30 and 10:00 p.m. on October 26, 1992, in the same location and position where it was subsequently found with the victims' bodies the next morning. At least four different witnesses also described seeing an older-model pickup truck with a light-colored camper shell parked near the Camaro at some point during this time period.

Two other individuals testified that they encountered the victims and their white Camaro at a nearby convenience store sometime between 8:40 and 9:00 p.m, on the evening of October 26, 1992. Both witnesses testified they saw James talking on a pay telephone, and heard Cynthia say something referring to "Leroy." Neither witness could tell whether Cynthia was talking to James about someone else named "Leroy," or addressing James by his own middle name of "Leroy." A third witness saw both victims sometime between 9:30 and 10:00 p.m. on October 26, 1992, at the Chevron minimart where she worked as a cashier. James purchased a soft drink at the time.

Exh. D to Answer, First District Court of Appeal decision, pp. 2-4.

## VI. DISCUSSION OF CLAIMS

### A. Trial Court Violated Petitioner's Fourteenth Amendment Rights to Due Process and to a Fundamentally Fair Trial by Erroneous Admission of Prosecution's Highly Prejudicial Character Evidence (Arleen Murphy Incident)

Petitioner contends that he has been deprived of due process and subjected to a fundamentally unfair trial by the trial court's having allowed, over defense objection, testimony about a previous incident involving petitioner to prove "motive, opportunity, intent, preparation, plan, knowledge, identity." The incident involved a witness named Arleen Murphy who charged that she had been threatened by petitioner within two days of the double homicide at issue. AP, pp. 33-34; Answer, pp. 7-8; Traverse, p. 31.

Petitioner understands that a violation of state evidence law does not in itself equate with a constitutional violation. The Supreme Court has reiterated the standards of review for a federal habeas court. *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475 (1991). In *Estelle v. McGuire*, the Supreme Court reversed the decision of the Court of Appeals for the Ninth Circuit, which had granted federal habeas relief. The Court held that the Ninth Circuit erred in concluding that the evidence was incorrectly admitted under state law since, "it is not the province of a federal habeas court to reexamine state court determinations on state law questions." *Id.* at 67-68, 112 S. Ct. at 480. The Court re-emphasized that "federal habeas corpus relief does not lie for error in state law." *Id.* at 67, 112 S. Ct. at 480, citing *Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092, 3102 (1990), and *Pulley v. Harris*, 465 U.S. 37, 41, 104 S. Ct. 871, 874-75 (1984) (federal courts may not grant

habeas relief where the sole ground presented involves a perceived error of state law, unless said error is so egregious as to amount to a violation of the Due Process or Equal Protection clauses of the Fourteenth Amendment). The Supreme Court further noted that the standard of review for a federal habeas court "is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States (citations omitted)." *Estelle v. McGuire,* 502 U.S. at 68, 112 S. Ct. at 480. The Court also stated that in order for error in the state trial proceedings to reach the level of a due process violation, the error had to be one involving "fundamental fairness," *Id.* at 73, 112 S. Ct. at 482, and that "we 'have defined the category of infractions that violate "fundamental fairness" very narrowly.'" *Id.* at 73, 112 S. Ct. at 482. Habeas review does not lie in a claim that the state court erroneously allowed or excluded particular evidence according to state evidentiary rules. *Jammal v. Van de Kamp,* 926 F.2d 918, 919 (9th Cir. 1991).

Background

Arleen Murphy's testimony is contained in the reporter's transcript (RT) from page 1185-1219; 1234-1349.[8]

[8] Although Murphy also testified that petitioner threatened to kill the Bells (RT 1256), the murder victims in this case, that testimony, as respondent notes, and petitioner concedes, is not at issue within this claim (Ans., p. 8; Traverse, p. 31, fn. 11), nor, specifically, is the testimony by another witness, Lynn Ruiz, witness Arleen Murphy's aunt, which, in its relevant portion, is summarized by the state appellate court as follows:

> Lynn Ruiz, Murphy's aunt, had been friends with victim Cynthia Bell for 15 years, and had known James Bell for about 5 years. On October 24, 1992, she saw Murphy and appellant at the gas station where she was working.

(Continued on following page)

The court again borrows from the state court appellate decision for an accurate summary of the facts that underlie this claim (any modification is by way of footnote):

> Several prosecution witnesses testified to appellant's erratic behavior during the weeks prior to the murders. Arleen Murphy had known appellant for 32 years, although she had lost touch with him for about 10 years until meeting him again in October 1992.[9] On October 24, 1992, appellant drove Murphy to Davis in his blue truck

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> Murphy appeared "nervous" and "antsy," like she was "in a hurry or bothered or something." At approximately 1:30 p.m. on October 26, 1992, Ruiz received a page from a telephone number she did not recognize. When Ruiz returned the call, appellant identified himself, stated he had asked Murphy to place the page for him, and said he wanted to talk with Ruiz about Cynthia. Appellant gave Ruiz his address and asked her to stop by his home after she got off work. Ruiz agreed.
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> .....
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> Appellant told Ruiz he had been upset with Murphy because he thought she was involved in a conspiracy with Bernal and others "to rip him off also," and described the incident in which he had taken "her for a ride out to the country," "scared her and threatened her," and "took his gun and told her he was going to blow her away . . . if she didn't explain. . . . " He had pointed his gun at Murphy's head, and had then fired "a couple shots out the window to scare her or something." Appellant told Ruiz that Murphy and Bernal "had to prove their loyalty." He "wanted to blow everybody away," and had only refrained from killing Murphy because he had "known her for 20 years" since they "went to school together."

Exh. D to Answer, pp. 5-6.

[9] On cross-examination, the undersigned notes, Ms. Murphy clarified that she and petitioner had both grown up in Dixon and had known each other since kindergarten and elementary school, riding the same bus over a ten-year period. RT 1266-1267.

with a white camper shell on it.[10] As he "always" did, appellant had a gun in a case on the dashboard of his truck. He was also carrying a second gun in his belt. After driving Murphy out a back road and stopping in an isolated location on a levee, appellant told Murphy he was upset because he thought she was in league with their mutual acquaintance Ryan Bernal to steal $1,300 from him, and it was time for her "to go to sleep." Murphy tearfully tried to tell appellant she had no reason to steal from him. Saying he "had to show somebody up north that he had killed" her, appellant held his gun out of the window and fired two shots into the air. Appellant then told Murphy "he was going to get to the bottom of why . . . he was being told [Murphy] was going to steal" his money. Then appellant drove Murphy back to a gas station where Murphy's aunt, Lynn Ruiz, worked. Appellant again told Murphy "[s]ome people up north" were supposed to think she was dead, and to stay in hiding for a couple of days "so he could get to the bottom of this."

Exh. D to Answer, pp. 4.

Petitioner offered his own version of the Arleen Murphy incident at trial: Appellant acknowledged driving Murphy out into the country on

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[10] Petitioner notes that Murphy testified that she ran into petitioner by happenstance on October 24, 1992 in the Lucky's supermarket lot in Davis; petitioner testified that Murphy called him to pick her up and give her a ride home to Dixon from Davis. AP, p. 33, RT 1190, 1269; RT 2845. Also in the record, on cross-examination of Murphy, her prior testimony in a preliminary hearing in January of 1993 was read into the record wherein Murphy had testified that she had called petitioner for a ride. RT 1270-71.

> October 24, 1992. He claimed he was merely taking the "rural route" to Davis. According to appellant, Murphy was "hysterical," so he simply let her talk for a while. Then he began to question her about a tape recording he had heard of a suspicious conversation between Murphy and Bernal. Appellant denied threatening to kill Murphy at any time or pointing a gun at her. According to appellant, he simply "decided to play a little game," and shot his gun out of the truck window twice. Appellant next saw Murphy on the morning of October 26, when, according to him, she called to ask him to pick her up at a friend's apartment in Davis. When he arrived, he became irritated because no one was there. He kicked the door, and it "flew open." He then went in and sat on a couch, thinking "somebody would show up sooner or later." When Murphy arrived, appellant left a note apologizing for the damage to the door.

Exh. D to Answer, pp. 21-22.

Petitioner asserts that trial counsel's motion in limine to exclude evidence of the Murphy shooting incident correctly characterizes any such evidence as "a propensity argument in disguise." AP, p. 34, citing CT 813. Petitioner sets forth the following portion of defense counsel's argument before the trial court:

> The only issue in the case is the identity of the perpetrator. Motive is not an issue. The defendant has never denied that he had reasons to be upset with the female victim because she attempted to burglarize his home. The issue of murder is uncontested . . . A theory that the incident in the remote area shows how the defendant deals with people he believes have stolen from him is a propensity argument in disguise. The

> argument more properly put is that the defendant when faced with people who attempt to steal from him has the propensity to act with violence or threats of violence. The courts have consistently found that evidence of other crimes or misconduct is inadmissible to prove propensity or disposition.

AP, p. 34, CT 813-14.

> Petitioner quotes the prosecution's argument from the reporter's transcript: [The incident is] very relevant in terms of 1101(b), in terms of the types of threats which are being made and the reason why they were being made. The time span, of course, is within a matter of a couple of days of the murders. It's alleged that the murders of the Bells . . . was a result [of[ . . . a theft, or at least in part an alleged theft of narcotics by them from the defendant, which is the same complaint which the defendant had to Ms. Murphy[.] . . . [T]he defendant's response to Ms. Murphy was the same as it's alleged with the Bells, that he took the gun, the same gun, . . . took the – confronted the individuals in an isolated spot, and threatened to kill them, and in fact did so with the Bells.

AP, p. 35, RT 468.

Petitioner contends that the prosecution's reliance on Cal. Evid. Code 1101(b) was "token." AP, p. 35. The record indicates that the prosecution offered, in part, the following rationale for the testimony at issue:

> [I]t goes to showing the defendant's motive, intent preparation, . . . and identity as to what happened a couple of days later to the Bells.

> [W]hat we have ... is this incident happens within a couple of days of the killing of the Bells. It is related to what the defendant perceived to be an attempt by Arleen Murphy and perhaps Ryan Bernal to steal methamphetamine from him.

RT 477.

Petitioner points to the closing argument wherein the prosecutor allegedly stressed the Murphy incident to persuade jurors to view petitioner as "a menacing and evil man" based on that event – the kind of man capable of committing the heinous murders of this case. AP, pp. 35-36, RT 5008-5009.[11]

In its unpublished decision, the First District Court of Appeal analyzed the issue as follows:[12]

> In a corollary to the preceding argument, appellant urges that because his proffered "bad acts"

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[11] "You have that terrible ride in the country. Arleen Murphy, think back to her. Talking about demeanor, one of those palpable, real things in this courtroom was her presence on the witness stand. As she talked about her dealings with the defendant and that ride in the country and being at his house on that Monday and that fear which was still in here two-and-a half years afterwards was as real as anything else. You heard her talk about the statements the defendant was making right up to that Monday when she's over there ... She was afraid the night of the ride in the country when her aunt, Lynn Ruiz, saw her. She was more afraid that night, that Monday night, because she knew what was going to happen. She knew just as sure as the defendant had told her on that Saturday he was going to kill her, that when he said he was going to go and kill the Bells, he meant it, and she was afraid. She was relieved that it was not her" RT 5009.

[12] In conducting an AEDPA analysis, it is the state court's "last reasoned decision," which in this case is the unpublished opinion of First District Court of Appeals, that is to be examined. *Benn v. Lambert*, 283 F.3d 1040, 1052 n. 7 (9th Cir 2002).

evidence against Borelli was excluded, the trial court should also have excluded the evidence of appellant's threatening behavior toward Murphy. There is no merit to the contention.

The crucial difference between the two situations is both obvious and determinative. As seen, there was no competent evidence proffered concerning Borelli's alleged prior threats or misdeeds against third persons. On the other hand, Murphy herself testified at length about how appellant took her for a long drive along deserted country back roads, stopped his pickup truck in an isolated location, threatened her life over a drug and money dispute, fired his .357-magnum out of the window, and told her he "was going to get to the bottom of this." Murphy's direct testimony about appellant's words and actions toward her indisputably distinguishes this incident from those alleged by appellant of Borelli.

By the same token, there is no question the evidence of appellant's behavior toward Murphy was admissible to prove motive, opportunity, intent, preparation, plan, knowledge and potential identity. The incident evidenced appellant's practice of using his gun to threaten people over drugs and money disputes, his method of going to an isolated spot to do so, and his stated desire and intent to kill those who he perceived as cheating him. This incident, occurring only two days before the subject murders, clearly demonstrates motive, plan, intent and identity. There was no error or abuse of discretion in admitting this evidence.

Exh. D to Answer, pp. 54-55.

Petitioner relies on the pre-AEDPA case of *McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993) which did hold that unwarranted and unduly prejudicial admission of propensity evidence constituted a due process violation. *Id.* at 1385. *McKinney* understood that the Supreme Court had left "unanswered" the question: "When does the use of character evidence to show propensity constitute a violation of the Due Process Clause?" *Id.* at 1384. *McKinney* did cite to federal criminal cases which recognized the disfavored nature of character evidence,[13] but none had gone so far as to equate admission of character evidence with a federal constitutional violation. The U.S. Supreme Court has, in fact, specifically left that question open. "Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime." *Estelle v. McGuire*, 502 U.S. 62, 75 n.5, 112 S. Ct. 475, 484 n.5 (1991). Because violation of clearly established law as pronounced by the *United States Supreme Court* is the sine qua non for an AEDPA violation, *see Holgerson v. Knowles*, 309 F.3d 1200, 1202 (9th Cir. 2002) (habeas relief not warranted if due process violation not clearly established by the Supreme Court), and such pronouncement is not available for the character/propensity evidence issue, petitioner is left to claiming that the interpretation of California law by California courts was wrong.

However, the record of this case discloses that the state courts did indeed interpret their law as allowing the

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[13] Interestingly enough, the disfavored character propensity evidence has nonetheless found favor in sexual assault cases. *See United States v. Sioux*, 362 F.3d 1241, 1243-44 (9th Cir. 2004).

use of the asserted character evidence of which petitioner complains. Because this court may not second guess the state courts on application of their law (except in circumstances demonstrating an avoidance of a federal constitutional rule), *see Estelle, supra*, at 502 U.S. at 67-68, 112 S. Ct. at 480; *see also Belmontes v. Woodford*, 350 F.3d 861, 888 (9th Cir. 2003), there remains nothing for this federal court to adjudicate. That is, in the absence of a recognized federal constitutional principle at odds with the state law, *see*, e.g., *Crawford v. Washington*, ___U.S. ___, 124 S. Ct. 1354, (U.S.Wash. Mar 08, 2004) (Confrontation Clause does not permit "prior testimony" hearsay evidence not subject to cross-examination even if permitted by state law), this court's AEDPA analysis is over. This is not a situation where the state courts conceded error but found the error to be harmless. In such a situation, it would be possible for the federal courts to review the evidentiary error for fundamental unfairness, but this case does not present the issue.

Accordingly, the state courts' decision on the admissibility of the character evidence under state law is the first and last word on this claim. The claim herein should be denied.

B. Trial Court's Admission of the Coerced Testimony of Prosecution Witnesses Shannon Paul Nissen, Edgar Fry and Deborah Kathleen Mathies Violated Fry's Right to Due Process

Petitioner claims that by allowing the testimony of "[t]he three most critical" prosecution witnesses without first conducting an evidentiary hearing to evaluate the claim of coercion, the trial court violated petitioner's Fourteenth Amendment due process rights. AP, p. 46. Trial

witnesses Nissen, Fry (petitioner's younger brother) and Mathies testified (Mathies' testimony was by way of "readback," rather than live testimony (RT: 1934))[14], inter alia that petitioner came home on the evening of October 26, 1992 with "blood on his person, clothing and effects"; all three, along with a jailhouse informant, also testified that petitioner confessed to the killings. AP, pp. 18-19, fns. 47, 48; citing RT 1682-1688; 1752-1759; 1962-1969; 1971-1972; 2010-2015.

The state court of appeals decision fairly sets forth the underlying facts of this claim:

> Kathleen (Debbie) Mathies's testimony at an earlier trial was introduced through reading a transcript.
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> > [Footnote 2] In connection with Mathies' testimony, the trial court told the jury: "Counsel and the Court have been going over a transcript of the prior testimony in September of 1994 of the witness Debbie Mathies. We had anticipated that Debbie Mathies would be here earlier this week, and then even as late as today, and counsel have agreed that we can read her testimony and make a finding that she's unavailable for trial because of her voluntary use of drugs and unable to testify. And the fact that she is unavailable is in no way connected to any acts or influence of the defendant, Mr. Fry. This lady is unavailable for the reasons of her own voluntary use of drugs."

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[14] It was stipulated that Debbie Mathies was unavailable for trial due to her own voluntary use of drugs and her failure to appear was not in any way related to petitioner. RT 1943-1944.

> Mathies testified that she was alone with appellant in his house a "couple" of days before the murders when someone knocked on the door. Mathies could see through a window that it was Cynthia Bell, and she informed appellant of that fact. Appellant told Mathies not to answer the door. Mathies went upstairs to see appellant in his bedroom, and closed the bedroom door. Cynthia went around to the back of appellant's house and entered through a sliding glass patio door. She then came upstairs and opened appellant's bedroom door. Cynthia appeared "shocked" and "surprised" to find that someone was there, and said she just wanted "to see what was going on" at the house. After a few minutes, Cynthia left. Later, Mathies overheard appellant tell Ringler that he was going to kill Cynthia because "she did him, wrong" over "[d]rugs and money." Mathies was also present at appellant's house on October 26, 1992, the day of the murders. At some point that day, she again heard appellant say he was going to kill Cynthia, and complain that Cynthia "owed him money for drugs, and they are lying and doing him wrong." Mathies had been using methamphetamine, marijuana and alcohol during the entire time period at issue.

Exh. D to Answer, pp. 7-8.

> In addition to Murphy, Ruiz, and Mathies, three other witnesses – Shannon Nissen, David Sparks and Edgar Fry – testified about appellant's actions in the days leading up to and including October 26, 1992, the date of the murder. A few days before the killings, appellant informed Nissen that Cynthia owed him $800 for drugs, and that Cynthia had told his girlfriend Ringler that

appellant was sleeping with Cynthia. Appellant "wasn't happy" about this. Appellant's brother, Edgar Fry, testified that during the day on October 26, appellant told him that "a day or so before this time" Cynthia had come into his residence without permission, and he had caught her coming up stairs. Appellant appeared "[i]Irritated"; he told Edgar he believed Cynthia had intended "[t]o steal his drugs." Appellant had a .357 revolver which he "usually" took with him whenever he left the house, carried in a soft tan-colored canvas case.

On October 26, 1992, Nissen was at appellant's residence with appellant, Bernal, Murphy, appellant's brother Edgar, and Ringler and her two girls. Victims Cynthia and James Bell were also present for some period of time during the day. In addition, Sparks and his friend Jason Gibeau arrived at some point in the evening in a dark minitruck. Sparks was carrying a .38-caliber pistol and approximately $1,000 in cash, because he was interested in purchasing an ounce of methamphetamine. There was some discussion between Sparks and appellant about the latter purchasing Spark's gun, but no sale of the gun took place. There was also some discussion of purchasing drugs at appellant's house, but Sparks declined because he already had a deal set up elsewhere. After about 30 minutes, Gibeau and Sparks left in Gibeau's truck. Bernal asked appellant if they were meeting at "505." Appellant replied, "That will work." Shortly thereafter, between 7:00 and 7:30 p.m., appellant retrieved his gun, and he and Bernal left in appellant's truck after telling Edgar he "was going to go make a drug deal, do some business." At some

point thereafter, Cynthia and James Bell also left appellant's house.

> [Footnote 3] Like much of the testimony in this case, there was some conflict in the witnesses' recollection of when the victims arrived at appellant's house on October 26, 1992, and when they left. As seen, Murphy testified the Bells arrived at approximately 5:30 p.m. shortly after Ruiz's departure, and she did not see them leave. Nissen testified that Cynthia and James Bell were present at appellant's house during the afternoon, and that they left about half an hour after appellant left with Bernal. On the other hand, Edgar Fry testified that the Bells were not at appellant's residence when he arrived there at approximately 5:00 p.m., and did not show up until 30 to 45 minutes after appellant left with Bernal. According to Edgar, the victims stayed for another 30 to 45 minutes and then left.

Edgar testified that Cynthia told him she was going to meet appellant near the "Wild Oates" store. The victims left in their automobile, a light-colored 1970's Camaro.

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Both Nissen and Edgar Fry testified that Bernal returned to appellant's house sometime later in the evening, stayed for a few minutes, and then left again. Hours later that night appellant returned, driving his light blue pickup truck with the camper shell on it. Nissen, Edgar, Mathies, and Ringler were all at appellant's house when he returned. Edgar, who was not wearing a

watch, estimated that it was approximately 10:30 p.m. when appellant returned.

Nissen, Edgar and Mathies each gave somewhat differing accounts of appellant's actions and appearance upon his return home. Nissen testified that appellant was wearing a T-shirt, blue jeans and tennis shoes, and was carrying his gun case. According to Nissen, there were spots of blood on appellant's shirt, his shoes, his forehead, the gun case, and "maybe his pants." Appellant appeared "tired" and "kind of nervous"; he went to the kitchen, wiped his face and forehead with a towel, and then walked up to his bedroom. Edgar testified that appellant was wearing "[p]ants with no shirt," and carrying a "satchel or briefcase." He immediately went "straight upstairs" and into the bathroom off the master bedroom, from which Edgar heard running water. In response to Edgar's question, appellant said he had taken his shirt off because there was blood on it. Edgar saw a large spot of blood on appellant's pants. Mathies saw appellant drive up and then sit in his truck for a while before coming in the house and going upstairs to the bathroom, where he washed blood off his hands. Mathies could not remember whether appellant was wearing a shirt.

Nissen, Mathies, Edgar and Ringler all followed appellant upstairs to his bedroom. Mathies testified that after coming out of the bathroom, appellant said that he had "killed her," and "had to do James, too." He reported that "[h]e blew their heads off with a gun," and that Cynthia's head "looked like spaghetti." He had shot James Bell "a couple of times in the back" after missing with his first shot. According to Nissen, appellant "kind of smiled" and asked him if he "had ever

seen what a .357 does to someone's head at close range." When Nissen shook his head "[n]o," appellant said "It's not pretty." Referring to Cynthia Bell, appellant stated "we wouldn't have to worry about her anymore." When appellant announced that the Bells "were taken care of," Edgar asked him if he "had done" Cynthia, Appellant said, "Yes." According to Edgar, appellant said he told Cynthia "she shouldn't have fucked with him," and told James "he was sorry" before shooting him. Like Nissen, Edgar also testified that appellant commented that "you couldn't imagine what a .357 would do . . . [t]o somebody's skull." Appellant pulled a nickel-plated .357 gun out of the gun case and unloaded it. The gun contained four spent shells and two live shells, which both Edgar and Nissen described as .357 "wadcutters." Appellant asked Nissen if he wanted to clean the gun. When Nissen declined, appellant handed the gun to Edgar, who cleaned it for him. Both Nissen and Edgar testified they saw what appeared to be blood on the gun. In addition, Mathies saw blood on appellant's wrist watch, which appellant also asked Edgar to clean off.

Both Mathies and Edgar Fry testified that appellant and Edgar discussed what to do with appellant's bloody clothes. Edgar told appellant that if he "did do it," then "he better get rid of his clothes." Edgar volunteered to take them with him when he left. At first appellant resisted the idea, because he had few pairs of pants and the ones he was wearing "were good pants." Eventually appellant gave Edgar a paper bag, which Edgar assumed contained appellant's clothing. He disposed of it in a dumpster. He knew that he could get in trouble for destroying evidence, but did it because he wanted to help his brother.

Appellant left the house again around 11:30 p.m., saying he was going to the Chevron station to "make a transaction." Appellant returned about 20 minutes later. Edgar left appellant's house between 1:00 and 2:00 a.m. that morning.

Nissen spent the night at appellant's house. The next morning, appellant asked him to help take the camper shell off appellant's pickup truck. Appellant was in a hurry; he told Nissen he "didn't want people to recognize the truck." While they were working on the truck, appellant told Nissen "that he shot [Cynthia Bell] and her boyfriend." Appellant described shooting Cynthia once in the head from the driver's side of the car, after which James Bell had turned toward appellant, put his hands in the air, and said "What the fuck are you doing." Appellant then demonstrated how he had shot James three times, "'pop, pop, pop.'" Nissen did not report appellant's confession when the police questioned him about the murders on October 28 as they served a search warrant on appellant's residence, because appellant was his friend, and he "didn't want him to get in trouble." In addition, Ringler and appellant both told Nissen that, if asked, he should say appellant was home at the time of the murders. A "couple days" later the police returned to the house to talk with Nissen, and threatened to arrest him for possession and use of methamphetamine. At that point, Nissen decided to tell the police what he knew in order to avoid arrest. On cross-examination, Nissen admitted reading press accounts of the killings before he spoke to the police. However, he testified he never felt threatened by the police to tell anything but the truth, and that he did tell the truth.

> Like Nissen, Mathies did not contact the police despite her knowledge of appellant's involvement in the murders. She testified she did not contact the police and initially denied knowing anything because she "was scared." She denied changing her story because the police had threatened to arrest her and take her children away. When she first heard appellant threaten to kill Cynthia Bell, Mathies did not believe it, and simply thought it was "an expression." On cross-examination, Mathies testified that Nissen was not in the bedroom when appellant was cleaning up after the killings.
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> Edgar Fry testified that during a conversation with appellant after the police first searched appellant's residence and seized his clothing, appellant told Edgar that he had thrown the .357 into the bushes at the Chevron station after he drove by his house and saw police activity there. Appellant said someone named "Mike" picked up the gun for him. A few days after the killing, while they were working on a car together, appellant told Edgar that he had the power "[t]o give or take life." Appellant told Edgar to "[j]ust keep [his] mouth shut" if contacted by the police. Edgar intended to do so, until contacted by the police and offered immunity for telling what he knew. The police never asked him to say anything but the truth, and never threatened him other than to tell him what he "was up against."

Exh. D to Answer, pp. 8-13.

Petitioner contends that defense counsel presented the trial court with substantial evidence that Nissen, Fry and Mathies had been coerced by law enforcement and by the prosecution, in the form of transcripts of recorded

statements to police and transcripts of testimony from prior judicial proceedings. AP, p. 46, citing CT 710-746; 758-777. Petitioner accurately summarizes the substance of defense counsel's in limine motion before the trial court to exclude the testimony of the three witnesses at issue:

> *October 26 or 27, 1992*: The Bells are killed. "The only person who claims to have witnessed the shootings was discounted and ignored by police. (The eyewitness, if believed, would clear defendant)" CT 778.
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> *October 27, 1992*: Officer Donald W. Wallar of the Vacaville Police Department speaks to Lynn Ann Ruiz. Office Wallar claims that Ruiz said that Fry told her, on October 26, 1992, that he was upset with Cynthia Bell and that he had said that he was going to blow her head off. "M[s.] Ruiz' taped statement made the day after next does not support [O]fficer Wallar's version of her statement.)"
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> *October 28, 1992*: "[P]olice executed [ ] a search warrant [at] the home of defendant Fry. Fry [is] also subjected to a lengthy interrogation. But since neither the interrogation [n]or the search reveal[ ] anything . . . incriminating . . . John Fry [is] released." (CT 779.) Shannon Nissen is interviewed. He denies having any incriminating information concerning Fry. (CT 780.)
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> *October 29, 1992*: The Bells roommate, Randy Raddosevich, is arrested. Detectives Michael A. Wood and William Rodda of the Vacaville Police Department interrogate Raddosevich. The detectives make "it clear that they [are] looking for dirt on John Fry." Wood threatens Raddosevich: " 'The only way you're going to walk out of here,

Randy, is if whatever you got to tell me is on the same wave length.' (Taped statement of Randy Raddosevich with Detective[s] Wood and Rodda on 10/29/92.) Mr. Raddosevich had nothing negative to say about John Fry and was not released from jail." (CT 779).

*October 30, 1992*: "[P]olice pick up David Sparks, who was with John Fry . . . on October 26, 1992. Sparks t[ells] police that he was about ready to take off since he thought that the evidence was pointing to him. Yet police assure [ ]Sparks not only that they [are] not interested in [him] but inform [ ] Sparks that John Fry [is] the murderer. They further inform[ ] Sparks (falsely) that defendant was the one trying to blamed [sic] the murders on Sparks." (CT 779.)

*November 2, 1992*: Police go to Fry's home without a warrant. There, they encounter Shannon Nissen, who had been staying at the home. He is "under the influence of illegal drugs." The police threaten Nissen "with arrest for the drug charges and on the homicide charges but not [sic] charges [are] filed against Nissent [sic] when he agree[s] to give a statement against defendant Fry." (CT 780.)

*November 4, 1992*: Nissen gives the police a "statement implicating Fry in the homicides. . . . Nissen, who [would] previously [have been] homeless except for the generosity of defendant Fry, [is] then put up in hotels by the police and his meals and other matters [are] taken care of. . . ." (CT 780-781.) The police go to "Edgar Fry's home. Edgar [is] very intoxicated. . . . Police threaten[ ] to arrest Edgar as an accessory to the homicides if he [does] not give a statement

> implicating his brother in the homicides. Police let Edgar know what they want[ ] him to say and Edgar say[s] what they want[ ]." (CT 781.)
>
> *November 5, 1992*: Police contact Debbie Mathies. After "Debbie at first denie[s] that she kn[ows] anything, police officers threaten[ ] to take her to jail and take away her kids if she [does not] tell them what they 'already' [know]. Many threats are on the police tape of the conversation." (CT 781.)
>
> *Additional/Subsequent Coercion*: Police suggest to Edgar Fry "that he not change any of his statements and that he not speak to the defense attorney. . . ." Shannon Nissen tells people that the "police originally convinced him to make a statement against Fry by telling Nissen that Fry was going to kill Nissen and Nissen's friends." (781.)

AP, pp. 47-48.

The First District Court of Appeal set forth the following analysis with respect to the claim that coerced testimony had been improperly admitted:

> Appellant argues the trial court erred by permitting the testimony of prosecution witnesses Edgar Fry, Debbie Mathies and Shannon Nissen to be admitted because it was allegedly "coerced" by the law enforcement authorities. In support, appellant points to evidence that each of these witnesses originally told the police that appellant was not involved in the murders, and did not begin to cooperate "until their own personal interests required them to implicate him."

This argument fails. When appellant first raised it at trial, the trial court reviewed all the transcripts provided by defense counsel of the witnesses' prior testimony at appellant's earlier trials. The trial court noted that although the police informed the witnesses they could be charged as accessories in connection with this case, there was also evidence the police pressed them only to "tell the truth." The trial court concluded that although there were certainly evidentiary questions going to the credibility of these witnesses, there simply was insufficient evidence they had been coerced to bar their testimony from admission altogether.

A defendant has only a limited right to exclude the testimony of third parties on the ground that it was coerced. In any motion to exclude the testimony of a third party witness on grounds of coercion, the defendant bears the burden of proving that (a) the witness was improperly coerced; and (b) the reliability of the witness's testimony was actually impaired by the coercion. (*People v. Badgett* (1995) 10 Cal. 4th 330, 346-350; *People v. Douglas* (1990) 50 Cal. 3d 468, 500.) Although the claim that a witness's statement to the police was involuntary is subject to independent review on appeal, when faced with conflicting testimony in the record a reviewing court must accept the version of the event most favorable to the People. (*Badgett,* supra, 10 Cal. 4th at pp. 350-352; *People v. Howard* (1988) 44 Cal. 3d 375, 394.) The record in this case fully supports the trial court's determination. The jury heard both the initial versions of the facts given to the police by Nissen, Mathies and Edgar Fry, and their subsequent statements inculpating appellant. All three witnesses acknowledged they knew of their exposure to charges relating to drugs or complicity in

> the facts of this case, but specifically denied being subject to police threats, pressure or coercion to say anything other than the truth. There is nothing inherently coercive about confronting a suspect with the legal predicament he or she is in, or with an offer to release from custody or refrain from prosecuting the suspect in return for his or her cooperation with a police investigation. (*Badgett*, supra, 10 Cal. 4th p. 355; *Douglas*, supra, 50 Cal. 3d at p. 502, fn. 7.) Nothing more coercive than that occurred in this case. Ultimately, the question was one of credibility. The jury had before it all of the relevant evidence, and was in the best position to judge the credibility of these witnesses. There was no error.

Exh. D to Ans., pp. 66-67.

Because there is no Supreme Court case which speaks directly to the issue presented, petitioner relies on *Chia v. Cambra*, 281 F.3d 1032, 1037 (9th Cir. 2002), wherein the court stated: "Ninth Circuit case law may be persuasive authority for deciding whether a state court decision unreasonably applied Supreme Court precedent. . . ."

It is true that the opinions of inferior federal courts "may be persuasive authority for purposes of determining whether a particular state court decision is an "unreasonable application" of Supreme Court law, and also may help determine what law is "clearly established." *Duhaime v. Ducharme*, 200 F. 3d 597, 600-01 (9th Cir. 2000). *See also Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003).

> This does not mean that Ninth Circuit case law is never relevant to a habeas case after AEDPA. Our cases may be persuasive authority for purposes of determining whether a particular state

> court decision is an "unreasonable application" of Supreme Court law, and also may help us determine what law is "clearly established." *See MacFarlane v. Walter*, 179 F.3d 1131, 1139 (9th Cir.1999) (looking to Ninth Circuit caselaw to confirm that Supreme Court case clearly establishes a legal rule); citing *O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir.1998) (holding that "to the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue").

*Duhaime v. Ducharme*, 200 F.3d 597, 600-601 (9th Cir. 2000). Notwithstanding, the Ninth Circuit has recently cast doubt on the efficacy or significance of this sort of persuasive authority, finding that a petitioner's "reliance on Ninth Circuit or other circuit authority is misplaced." He must show that the California Court of Appeal decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court*." *Arredondo v. Ortiz*, No. CV-01-00788-ABC, 2004 WL 834782, at * 2 (9th Cir. Apr. 20, 2004) [emphasis in original].

Citing only out-of-circuit authority, petitioner contends that "a criminal defendant may challenge the voluntariness of a witness statement offered by the government 'not based on any violation of [the witness'] constitutional rights, but rather as a violation of [his or] her own Fourteenth Amendment right to due process.'" AP, p. 48, citing, inter alia *Clanton v. Cooper*, 129 F.3d 1147, 1158 (10th Cir. 1997); *United States v. Merkt*, 794 F.2d 950, 961 (5th Cir. 198); *United States v. Chiavola*, 744

F.2d 1271, 1273 (7th Cir. 1984); *United States ex rel. Cunningham v. DeRobertis*, 719 F.2d 892, 895-896 (7th Cir. 1983); *United States v. Fredericks*, 586 F.2d 470, 481 (5th Cir. 1978). *See also Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994) ("Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's confession at another's trial violates his rights under the due process clause").

Petitioner predicates his specific Fourteenth Amendment claim as to the allegedly coerced testimony exclusively on "the principles set forth in *La France v. Bohlinger*, 499 F.2d 29 (1st Cir. 1974)." AP, p. 49. In *La France*, the defense objected to the introduction of a statement signed by a witness attesting to the defendant's guilt in a hit-and-run incident, when the same witness testified in support of defendant's alibi at trial, *Id.* The witness testified that at the time he made the statement that he had been threatened by police and "that the statement was, in effect, a police fabrication signed because he was strung out on drugs, frightened, and willing to say anything to get back to his cell . . . . and persisted in maintaining that it was false." *La France*, 499 F.2d at 31.

The First Circuit found that the trial court or a separate jury should have first determined the voluntariness of the statement to police before allowing the trial jury to determine its credibility, relying on *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964) and *Lego v. Twomey*, 404 U.S. 477, 485-486, 92 S.Ct. 619, 624-625 (1972). [*See also Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246 (1991) (finding coercion in a confession where the state conduct instilled a fear for safety in the defendant)]. In *Lego*, the Supreme Court noted that whether or

not a coerced defendant's confession was reliable or true in *Jackson* was not the central issue, rather, the high court "feared that the reliability and truthfulness of even coerced confessions could impermissibly influence a jury's judgment as to voluntariness." *Lego v. Twomey*, 404 U.S. at 485, 92 S. Ct at 624. What was at issue was whether or not the confession, true or false, was coerced, because use of such a confession "offends constitutional principles" due to the "method used to extract them." *Id.* As the *La France* court frames the issue, "[a]t stake is not 'improving the reliability of jury verdicts' . . . but screening out evidence which, if found to be induced by coercion, is unacceptable regardless of its truth or untruth." *La France*, 499 F.2d at 33. Thus, the case was remanded to state court for that court to independently determine whether the statement at issue was coerced, the government having the burden to prove an absence of coercion by a preponderance of the evidence; should the court, after hearing the evidence determine the statement not to have been coerced, the judgment would stand. *La France*, 499 F.2d at 36.

However, once again, petitioner is up a Due Process creek without a Supreme Court paddle. It is tempting to find, as have many pre-AEDPA circuits, that the established prohibition against coercing a *defendant's* confession can be extrapolated to witnesses as well. If the undersigned were writing on a clean slate, he might so find. But the fact is that the United States Supreme Court has had two occasions to take up the matter and has declined to address the issue both times over vigorous dissents. *Bradford v. Michigan*, 394 U.S. 1022, 1023-24, 89 S. Ct. 1638, 1639-40 (1969) dissent from denial of certiorari (Warren, Douglas and Marshall, JJ, quoting the dissent of Justice Rutledge in *Malinski v. New York*, 324

U.S. 401, 430-31, 65 S.Ct. 781, 795 (1945) ("'due process does not permit one to be convicted upon his own coerced confession. It should not allow him to be convicted upon a confession wrung from another by coercion. A conviction supported only by such a confession could be but a variation for trial by ordeal.'") Moreover, the establishment, or expansion, of an exclusionary rule is not a slight matter. In the AEDPA context, new exclusionary rules should be left to the Supreme Court and not the inferior courts.[15]

If left to his own devices, the undersigned would order an evidentiary hearing to ferret out actionable coercive conduct, if any. However, AEDPA does not permit the claim to be recognized regardless of the facts. Mention must also be made that even if an evidentiary hearing found actionable coercion, prejudice on this record is not a given. In this case, none of the witnesses repudiated their earlier statements implicating petitioner, but as the court has seen in its review of the extensive trial testimony, petitioner's trial counsel read into the record before the jury portions of police interviews and prior testimony from the witnesses not entirely consistent with the testimony they offered at the third trial, emphasizing earlier concessions by the witnesses that they felt pressured by police. Nevertheless, the strength of any coercion on the witnesses becomes much more doubtful – the third time around.

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[15] As a postscript to the denial of certiorari in *Bradford*, the district court in Michigan granted a habeas petition based on the coerced testimony of a witness which was then upheld by the Sixth Circuit. *Bradford v. Johnson*, 354 F. Supp. 1331 (E.D. Mich. 1972) *aff'd*. 476 F.2d 66 (6th Cir. 1973) (on the grounds set forth in the district court opinion). However, this decision did not depend on the existence of extant Supreme Court authority.

How much could testimony in the *third* trial have been the product of coercion taking place prior to the first trial. However, the court need not finally address prejudice in the absence of a cognizable claim.

This claim should be denied.

C. Petitioner's Sixth Amendment Right to Confront the Witnesses Against Him Was Violated When Petitioner's Right to Cross-examine the Key Witness Against Him, His Brother, Was Impermissibly Restricted (Including Alleged Threats Made to the Brother)

In his third claim, petitioner contends that the trial court abridged petitioner's Sixth and Fourteenth Amendment rights by unduly restricting petitioner's cross-examination of Edgar Fry, petitioner's brother, a key prosecution witness. AP, p. 51, Traverse, p. 4. The state's First District Court of Appeals analyzed this claim as follows:

> [A]ppellant maintains the trial court improperly restricted his cross-examination of prosecution witness Edgar Fry, thereby allegedly denying appellant's constitutional rights to confront and cross-examine the witnesses against him. As in the case of his other arguments, appellant is wrong.
>
> Appellant asserts the trial court prohibited him from "fully exploring" four "areas related to Edgar's credibility": (1) the threats allegedly made to him by the police; (2) problems in Edgar's relationship with appellant; (3) questions about Edgar's state of mind at the time of the murders, including his alleged depression, drinking and

drug abuse problems; and (4) questions about whether Edgar obtained the factual information to which he testified from his own personal knowledge or from the police. According to appellant, the trial court improperly "restricted defense questioning in each of these areas, over defense objection; on the grounds "there had already been adequate testimony in those areas." Yet appellant does not provide any specific examples of questions he asserts were proper, but which were improperly disallowed by the trial court.

Under the Sixth Amendment of the United States Constitution, a defendant has the constitutional right to confront the witnesses against him and to cross-examine his or her accusers. Nevertheless, a trial court retains broad discretion over the conduct of trial. Included within this discretion is the power to impose reasonable limits on cross-examination, in order to preclude repetitive, confusing, and unduly harassing interrogation. Thus, the Confrontation Clause simply guarantees an opportunity for effective cross-examination; it does not guarantee an opportunity to cross-examine in whatever way, and to whatever extent, the defense might wish. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679-680; *Davis v. Alaska* (1974) 415 U.S. 308, 315-316.) As long as the cross-examiner has the opportunity to place the witness in his or her proper light, and to put the weight of the witness's testimony and credibility to a reasonable test which allows the jury fairly to appraise it, the trial court may permissibly limit cross-examination to prevent undue harassment, expenditure of time, or confusion of the issues. (*Davis v. Alaska*, *supra*, 415

U.S. at p.318; *Evans v. Lewis* (9th Cir. 1988) 855 F.2d 63 1, 634 ; *Steele v. Perez* (7th Cir. 1987) 827 F.2d 190, 193-194.)

Appellant's failure to cite any examples of questions he contends the trial court should have permitted him to ask Edgar Fry is fatal to his present argument. Contrary to appellant's vague assertion of improper restrictions on his cross-examination of Edgar, the record actually shows defense counsel was given ample opportunity to inquire into all of the subjects he cites in his brief on appeal. Thus, the trial court permitted defense counsel to question Edgar on his state of mind and usage of drugs and alcohol around the time of the murders. Under cross-examination, Edgar conceded he was depressed about his separation from his wife, and had been using drugs and alcohol. Defense counsel also questioned Edgar at great length about the supposed threats made to him by the police. Similarly, defense counsel cross-examined Edgar concerning his relationship with his brother with repeated questioning about whether they had a "good" relationship, how much time Edgar spent at appellant's house, whether the two "clicked," whether Edgar told police he did not "give a 'F' about" appellant, and whether Edgar ever called appellant "a kick in the dirt as far as I'm concerned." Finally, defense counsel was permitted to question Edgar at length about whether the information to which he testified "originated" with the police as opposed to his own personal experience and observation.

On this record, appellant has utterly failed to establish that any unconstitutional restrictions were placed on his cross-examination of Edgar.

> To the contrary, the record demonstrates that, as to every subject now cited by appellant as an example of one on which his cross-examination of Edgar was unduly restricted, he actually asked many probing questions and was barely restricted in his cross-examination at all.

Exh. D to Ans., pp. 67-69.

In his petition before this court, petitioner divides into three specific areas the inquiry from which he alleges he was foreclosed:

> (1) Edgar's assessment concerning the degree to which his judgment was impaired when he was being interrogated by the police (RT 2140-2141), (2) the nature and closeness (or lack thereof) in the relationship between the Fry brothers (RT 2158, 2307), and (3) certain aspects of the influence on Edgar occasioned by suggestive police questioning and police threats. (RT 2148-2149, 2154-2155, 2225, 2301-2303).

AP, p. 58.

Petitioner quotes at length the on-the-record statement petitioner's trial counsel made to the court (outside the presence of jury) during her cross-examination of Edgar Fry. AP, pp. 51-52, citing RT 2243-2245. In addition, defense counsel submitted points and authorities on the admissibility of evidence of threats. AP, p. 51, n. 68, citing CT 844-846.

Having noted that the state appellate court faulted appellate counsel on direct appeal for failing to cite specific examples of questions that should have been allowed (AP, p. 55), petitioner sets forth examples of the trial court's limitation of the cross-examination. Petitioner commences

with a first category speaking to the witness' "sobriety, state of mind and judgment" during the initial police interrogation of Edgar Fry on November 4, 1992, in which Edgar "testified" that he was under the influence of marijuana, heavily under the influence of alcohol, "'emotionally down'" and not in a happy period of his life. AP, p. 52, citing RT 2139-2141.

Q: [S]o at the time you talked to the police officers, you were not in the state to exercise the best of judgment; isn't that true?

[Prosecutor]: Objection, vague. Calls for speculation.

The Court: Sustained.

RT 2140.

Q: Isn't it true that you were in such a state at the time you talked to the police officers of intoxication that you could not exercise the best of judgment?

[Prosecutor]: Objection, the question has been asked, and the objection sustained.

The Court Yes. I'll sustain the objection to that. You can ask him what he did, and then we can make a determination as to whether or not he was able to do what he did.

RT 2141.

As to the second category, concerning the nature of the witness' relationship to his brother, petitioner includes the following exchanges:

Q: Isn't it true that you never talked to your, uh – to John Fry[,], brother to brother[,] in your whole life?

[Prosecutor]: Objection, relevance.

The Court: Sustained.

[Prosecutor]: Vague.

[Defense]: I would like to put this one on the record, Your Honor.

The Court: It's on the record. It was sustained.

[Defense]: Isn't it true that you've had a lot of disagreement with your brother?

[Prosecutor]: Objection, relevance. Vague.

[Defense]: Your Honor, he said that his relationship was pretty good. I have a right to challenge that.

The Court: Well, I think I'll sustain the objection to the form of the question. I mean, he could have had an argument when he's four years old. I don't know if that's relevant to the trial. . . .

AP, p. 53, RT 2158.

Q: Isn't it true, Mr. Fry, that you even wished the police good luck in prosecuting your brother?

[Prosecutor]: Objection, relevance, hearsay.

The Court: I'll sustain it. That doesn't go to bias. Sustained.

AP, pp. 53-54, RT 2307.

In the third category, alleged police threats against as well as police "spoon-feeding" of, Edgar Fry, petitioner sets forth the following:

Q: [P]rior to the first [trial] . . . didn't . . . Officer Wood and another officer come to your house and threaten you not to change your testimony?

A: They told me that if I didn't stick with the truth that they could throw me in jail for contempt, yeah.

Q: Well, they didn't always use the word "truth," did they?

.....

A. Yeah, they did.

.....

Q: [Looking to] your police statement of January 6th, 1993 . . . [t]he officer didn't use the word, "truth," did he?

[Prosecutor]: Objection, hearsay.

[Defense]: Your Honor, it's for impeachment. He said that they did each time.

The Court: I'm going to sustain the objection.

AP, p. 54, RT 2148-2149, 2154-2155.

Q: And it was pretty clear to you when you were talking to the police officers on January 8th that they – that's what they wanted to

hear about the statement of what a .357 could do to a skull; isn't that true?

[Prosecutor]: Objection, calls for speculation.

The Court: Sustained.

[Defense]: Talking about his state of mind. [Prosecutor]: She's asking about the officer's state of mind.

[Defense]: No, I'm asking –

The Court]: I sustained the objection.

AP, pp. 54-55, RT 2225.

Q: Now, you said you were given immunity, but you were told you had to tell the truth; is that correct?

A. Yes.

Q: But the person who was deciding that truth was supposedly the District Attorney; isn't that true?

[Prosecutor]: Objection.

The Court: Sustained.

[Prosecutor]: Objection, Your Honor.

The Court: Not relevant, sustained.

.....

Q: [D]uring that immunity agreement, wasn't there also – didn't the . . . Assistant District Attorney also

tell you that if you wanted immunity, you couldn't sit there and jack the prosecution around?

[Prosecutor]: Objection, asked and answered.

The Court: Sustained.

[Defense]: Your Honor, I haven't asked this before.

The Court: Well, we've talked about that enough.

[Defense]: The DA –

The Court: I'm going to sustain the objection.

AP, p. 55, RT 2301-2303.

Half-buried within respondent's argument, respondent notes that only in his habeas petition does petitioner provide the specific examples of disallowed questions, which the state appellate court deemed "fatal" to petitioner's (as appellant) argument. Citing *Anderson v. Harless*, 459 U.S. at 6[, 103 S. Ct. at 277] and *Vasquez v. Hillery*, 474 U.S. at 260[, 106 S. Ct. at 622], respondent makes only a single and passing reference to petitioner's having failed "to fairly present the factual basis of the claim to the state courts." Ans., pp. 16-17. Respondent's failure to develop any non-exhaustion argument and the half-hearted manner in which it is raised are such that petitioner is not even given sufficient notice to address it. While any such argument with respect to this claim is not explicitly waived by respondent (28 U.S.C. § 2254(b)(3)), respondent only pressed the contention that it is petitioner's failure to have sought an evidentiary hearing on the coerced testimony claim (claim 2) that rendered the amended petition unexhausted, which contention the court

has addressed. Moreover, the cases cited do not militate for a finding of non-exhaustion in the context of this claim.

As to the merits, respondent's reasoning tracks the state appellate court's analysis; respondent also specifically contends that at the beginning of cross-examination, defense counsel was allowed to get testimony in as to Edgar Fry's state of mind and drug and alcohol use during the period when he was approached by police, with the concession that he was drinking heavily and separated from his wife, as well as the concession that "'it wasn't the happiest time of my life,'" and an admission to marijuana use. Ans., p. 17, RT 2138-2140. The undersigned notes that the record also indicates that the court itself sought to clarify that Edgar Fry stated that he had been drinking heavily and had used marijuana at the time of the November 4, 1992 police interview:

> The Court: All right. And you're saying at the time of that interview, Mr. Fry, you had consumed alcohol to such an extent that you were under the influence of alcohol?
>
> The Witness: Yeah.
>
> The Court: All right. And in addition to using alcohol on the date and at the time of this first interview at your parents' house on November 4th 1992, you had also consumed marijuana along with the alcohol?
>
> The Witness: Yeah.

RT 2241:7-16.

Respondent asserts that petitioner asked a number of questions about the relationship of the brothers, whether

it was "'good,'" whether the witness often visited petitioner's house, whether the two "'clicked,'" whether he had called petitioner "'a kick in the dirt.'" Ans., p. 17, RT 2157-2160.

The witness was also asked by the defense about whether information "'originated'" with the police with his prior answers read back to him. AP, p. 17, RT 2222-2223, 2288, 2297.

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." The "'exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" *Davis v. Alaska*, 415 U.S. 308, 316-17, 94 S. Ct. 1105, 1110 (1974) (Sixth Amendment right to confront witnesses required that defendant be allowed to challenge a witness with evidence of a possible motive for his alleged misidentification). *See also Redmond v. Kingston*, 240 F. 3d 590, 591-92 (7th Cir. 2001) (where defendant was accused of statutory rape, exclusion of victim's prior false allegation of rape violated confrontation clause because it excluded evidence that victim had "a motive for what would otherwise be an unusual fabrication").

A "defendant's right to present evidence is not absolute; he must comply with established rules of evidence and procedure." *Carriger v. Lewis*, 971 F. 2d 329, 333 (9th Cir.1992). A criminal defendant "does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Montana v. Egeloff*, 518 U.S. 37, 42, 116 S. Ct. 2013, 2017 (1996) (quoting *Taylor v. Illinois*, 484 U.S. 400,

410, 108 S. Ct. 646, 653 (1988)). Hearsay rules, for instance, "prohibit the introduction of testimony which, though unquestionably relevant, is deemed insufficiently reliable." (*Id.*) Further, the Confrontation Clause does not prevent trial judges from imposing limits on cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435 (1986) ("the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish" (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 294 (1985) (per curiam) (emphasis in original)). In fact, "a trial judge retains 'wide latitude' to limit defense counsel's questioning of a witness without violating a defendant's Sixth Amendment rights." *Carriger*, 971 F. 2d at 333; *Michigan v. Lucas*, 500 U.S. 145, 149, 111 S. Ct. 1743, 1746 (1991).

After reviewing the record, the undersigned concludes that petitioner's trial was not rendered fundamentally unfair[16] because of the trial court's evidentiary rulings on petitioner's trial counsel's efforts to cross-examine his brother, the witness Edgar Fry. While the record shows that the trial judge did, indeed, curtail some of defense counsel's lines of inquiry, and, in fact, was on the face of it simply wrong, in ruling, for example, that the witness' apparent good wishes to the police in the prosecution of his brother did not go to bias, that is not the applicable standard under

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[16] Because the alleged lack of confrontation resulted from evidentiary rulings to specific questions, the court utilizes an *Estelle* fundamental fairness analysis. If no confrontation whatsoever had been allowed, e.g., in a child rape case where a child is not exposed to direct cross-examination, the analysis might have taken on a different form.

AEDPA. It is also true that the trial judge simply sustained an objection for which no legal basis was offered. Traverse, pp. 42-43. The record of the cross-examination demonstrates that petitioner was able to impeach and undermine the credibility of the witness with transcripts from earlier testimony and police interviews on a variety of issues. A trial judge being wrong on several occasions in sustaining objections to a defense counsel's cross-examination cannot be construed, in these circumstances, as depriving petitioner of adequate cross-examination.

Another way of looking at the same issue is even assuming that the trial court's curtailment of the cross-examination was an unconstitutional restriction, as petitioner observes, such a restriction would be subject to a harmless error analysis. Traverse, p. 58, fn. 74.

> A Confrontation Clause violation is subject to harmless error analysis. *See Delaware v. Van Arsdall*, 475 U.S. 673, 681-84, 106 S.Ct. 1431[ ] (1986); *United States v. Bowman*, 215 F.3d 951, 961 (9th Cir.2000). Under *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 17101[ ] (1993), habeas relief is proper only if any error by the state courts "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710.

*Hernandez v. Small*, 282 F.3d 1132, 1144 (9th Cir. 2002).

The trial record reveals that petitioner's trial counsel engaged in a comprehensive, substantive and lengthy cross-examination of witness Edgar Fry. The witness admitted to being intoxicated by both alcohol and marijuana at the November 4, 1992 interview, from which a reasonable juror could, even would, infer impaired judgment even if not expressly admitted. Moreover, it is

unlikely that this point could have been developed further to much effect, the witness having conceded the point.

Moreover, as noted, defense counsel was able to demonstrate, despite the witness' denials on the stand, that in discussions with police, he had denigrated his brother. Petitioner's not being permitted to fully develop any remoteness and/or alienation from or animosity and/or bias witness Edgar Fry may have felt against his brother, while somewhat troubling, actually conceals very little from the jury, as, after all, the witness was forced to concede that he had called his brother a "kick in the dirt" on the record.

Defense counsel's questioning forced petitioner to concede that he had said under oath that he had been threatened by police.[17] Petitioner was also given ample room to probe whether or not police "fed" the witness. As an example, in the section cited by petitioner of improperly curtailed cross-examination about who originated the comment about "what a .357 could do to a skull," defense counsel was able to point out that the statement was not

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[17] Q. In March 1994, did you testify about the threats that the police made to you?"

A. Yes.

Q. In January of 1993, did you testify about the threats that the police had made to you?

A. Yes.

Q. And in November of 1994, October, November, did you testify about the threats the police had made to you?

A. Is that another one of the trials?

Q. Yes.

A. Yeah."

RT 2149-2150.

made by the witness until January 8, 1993, some two months after he had been speaking with the police, that just before the police asked him whether or not petitioner had made such a statement, the witness stated that he could not remember what petitioner had said other than intimating that he had killed the victims. RT 2222-2225.

The finding of the state appellate court, that petitioner's trial counsel was provided ample opportunity to probe the witness is substantiated by the record, and to the extent that she was unconstitutionally limited, if at all, this court finds that the petitioner does not demonstrate that the restrictions "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637, 113 S. Ct. 1710. The state court's denial of this claim was neither contrary to, or an unreasonable application of, clearly established federal law. This claim should be denied.

D. Petitioner Was Denied His Right to Present a Defense by Exclusion of Testimony of a Witness Who Overheard a Third Party Confession to the Murders

Petitioner claims to be innocent of the murders of which he has been convicted. AP, p. 2; Traverse, pp. 5-6. As noted, petitioner's first two trials ended in hung juries. AP, p. 2. Jury deliberations in the third trial spanned five weeks, with jurors at one point declaring themselves deadlocked with a 7-5 split. AP, p. 2; CT 664-667[18]; RT 5154.6. An eyewitness, a truck driver, Russell Carter, a neutral party who knew

[18] As already noted (see footnote 5), the court cannot locate pages 660-667 of the clerk's transcript in the record submitted in this matter.

neither the victims nor the defendant, testified that he had been driving by as the shootings occurred, saw the man who perpetrated the murders and that that individual was not petitioner. AP, pp. 2, 4, 13-16; RT 4578, 5154.6; Traverse, p. 6. Petitioner declares that while the jury in the third trial was allowed to hear the Carter testimony, jurors were not allowed to hear the testimony of Pamela Marie Maples concerning the confession of her cousin, Anthony Hurtz, the person petitioner claims to be the actual shooter. AP, p. 4. Hurtz was a drug dealer (AP, pp. 4-5; RT 3994, 4065, 4485), whose killing of the victims was purportedly drug-related. AP, p. 5. Petitioner asserts that Anthony Hurtz repeatedly confessed to different people that he had perpetrated the killings. AP, pp. 22-26; RT 3995-3999, 4138-4145, 4156-4158, 4229-4230; Traverse, pp. 44-52.

Petitioner maintains that exclusion of testimony from a witness that another individual had confessed to the killings at issue in this case resulted in a deprivation of petitioner's "fundamental constitutional right to a fair opportunity to present a defense," Traverse, p. 44, fn. 21, quoting *Crane v. Kentucky*, 476 U.S. 683, 687, 106 S. Ct. 2142, 2145 (1986).

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, [410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973)], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925 [] (1967); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 [] (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."

*Crane v. Kentucky*, 476 U.S. at 690, 106 S. Ct. at 2146.

Petitioner[19] contends that Anthony Hurtz killed the victims

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[19] "Appellant testified in his own defense, In October 1992, he owned a 1977 '[p]owder blue' Ford pickup truck with a white camper shell. At the time he also owned five guns, including a Ruger .357-magnum. Appellant denied killing either Cynthia or James Bell, threatening to do so, or talking with anyone about having done so.

Appellant testified that he began selling drugs to support his own methamphetamine habit after he was fired from his truck driving job in September 1992. He was not very successful at it, and was 'slowly losing ground.' Appellant met Cynthia Bell because she was a friend of his girlfriend, Ringler. He would 'front' one-sixteenth of an ounce of methamphetamine to Cynthia, who would in turn 'cut' the drug, divide it into smaller parcels, and then pay him back after selling it herself. Although Cynthia was in debt to appellant for as much as $700, appellant claimed she would always pay him back. Just before she was murdered, Cynthia owed him between $150 and $170. Appellant claimed that he never threatened Cynthia about the money she owed him.

Appellant described the incident on October 23, 1992, in which Cynthia Bell 'entered my house without asking, or broke into the house, however you want to say it.' He claimed that he did not get angry at Cynthia; instead, he was 'more amused' by the incident. After Cynthia found him in his bedroom, he 'fronted' her a quantity of methamphetamine, injected her with some of the drug, and then socialized with her and James Bell. He claimed that after that, everything 'was fine' between them.

Appellant had known Murphy from going to school with her between 1966 and 1979. He started selling drugs to her in October 1992. Murphy introduced appellant to Bernal about one week before October 26. Through Bernal, appellant also became reacquainted with Daryl Borelli, whom appellant had known in high school. Bernal served as a conduit for drug purchases by appellant from Borelli. On October 25, Borelli brought two ounces of methamphetamine to appellant's house. They had never dealt personally with each other before. Later that night, Borelli came over to appellant's house again. They talked in appellant's bedroom about the 'games' Bernal was playing, and decided that from then on Bernal would not serve as a 'middleman' for them. According to appellant, Borelli told him that as long as he had Murphy and Cynthia in his business, he 'was going to have problems,' and Cynthia 'shouldn't even be able to breathe the air that we do.' Appellant

(Continued on following page)

denied saying anything negative about Cynthia to Borelli or twirling a gun around in his presence.

Appellant acknowledged driving Murphy out into the country on October 24, 1992. He claimed he was merely taking the 'rural route' to Davis. According to appellant, Murphy was 'hysterical,' so he simply let her talk for a while. Then he began to question her about a tape recording he had heard of a suspicious conversation between Murphy and Bernal. Appellant denied threatening to kill Murphy at any time or pointing a gun at her. According to appellant, he simply 'decided to play a little game,' and shot his gun out of the truck window twice. Appellant next saw Murphy on the morning of October 26, when, according to him, she called to ask him to pick her up at a friend's apartment in Davis. When he arrived, he became irritated because no one was there. He kicked the door, and it 'flew open.' He then went in and sat on a couch, thinking 'somebody would show up sooner or later.' When Murphy arrived, appellant left a note apologizing for the damage to the door.

Appellant asked Murphy to contact Ruiz because he wanted to ask her advice about how to get along with heavy methamphetamine users. He denied making any threats against the Bells or anyone else while talking with Ruiz. He 'could have said something' to the effect that he felt 'like just blowing them away,' but he was only 'laughing and joking,' and not directing the comment 'toward any one person.' Appellant decided he 'didn't want to deal in drugs anymore,' because he 'didn't want to put up with the games that were being played,' and was planning on 'cutting everybody loose,' including Cynthia. He did not want to talk to Cynthia or have anything to do with her, although she would continue to be welcome in his house because of her friendship with Ringler. Appellant denied making any arrangements with Cynthia to meet her at the intersection of Interstate 505 and VacaValley, or anywhere else that day.

Sparks arrived at appellant's house with 'another kid' whom appellant did not know between 5:30 and 6:00 p.m. on October 26, 1992, and tried to sell appellant a .357 special. Appellant did not buy it because it was damaged. According to appellant, Sparks said he had some money and was looking for an ounce of methamphetamine. Because he did not want to deal in his house, appellant told Sparks to wait in a nearby park while appellant tried to find some drugs. Appellant and Bernal left in appellant's pickup truck at the same time Sparks left. When Sparks proceeded onto the freeway instead of toward the park, appellant followed close behind and blinked his headlights.

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They pulled over, and agreed that Sparks would come with appellant to look for methamphetamine while Bernal went with Gibeau and then met them at a gas station in an hour. Once appellant found some methamphetamine, however, Sparks was no longer interested in buying it and instead asked appellant to take him to Vacaville. Appellant declined, saying he would take Sparks to the agreed rendezvous. According to appellant, Sparks 'was so spun, he couldn't talk.' After driving around for awhile looking for someone to purchase Sparks' gun, appellant stopped at the gas station and got out to telephone Ringler, leaving his own .357 gun on or under the seat. When appellant returned to the truck, Sparks was gone. Appellant did not see Sparks leave; he assumed Bernal had picked him up. Appellant did not check to see if his gun was still in the truck.

Appellant testified that after Sparks left, Bernal and Gibeau arrived and talked with him for about 20 minutes before leaving. John Peterskoff and Manuel Michel, two of appellant's former trucking acquaintances, also pulled up at the gas station. After drinking beers and socializing with them for at least an hour, appellant telephoned Ringler at approximately 7:00 p.m. Thereafter, he 'shot up,' and drove home 'very slowly.' When he got home, he 'pulled into the driveway and sat there for a while, 'trying to maintain control' and 'get a focus.' After Mathies, Nissen and Ringler asked him if he 'was going to come inside or just sit out there all night,' he came inside with his briefcase and his shirt on. Because appellant "was pretty spun" on drugs at that point he 'didn't even think about' his gun, even though it was his normal custom always to retrieve his gun from the truck and bring it into the house with him in the briefcase or some other holder. Appellant went upstairs, put down his briefcase, and went into the bathroom. He denied changing his clothes or having any blood on him. A few minutes later, someone came to the bedroom and informed appellant that Michel was there to see him. Michel stayed for about an hour talking with appellant and taking drugs. Between 10:00 and 10:30 p.m., in response to two telephone calls, appellant went to the nearby Chevron station to supply Pete and Shannon Joy with methamphetamine. After about 20 minutes, appellant came home and went to sleep.

The next morning, appellant asked Nissen to help him take the camper shell off of his pickup truck because he wanted to save gas mileage. He denied telling Nissen he did not want anyone to recognize the truck, or saying anything to Nissen about the victims. Appellant claimed to have asked Nissen to take his gun from his briefcase, and to put it behind the seat of the truck. According to appellant, his 'last clear recollection' of the gun was seeing in [sic] on the seat of his truck while

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he was talking with Sparks. He assumed the gun was in his briefcase because it was his usual habit to put it in the briefcase when he got out of the truck and went into the house. Appellant conceded that his usual custom was to have a trigger lock on the gun, and that it would have to be removed for the gun to be used.

[Footnote 5] On October 28, 1992, the police found a trigger lock in a gym bag on the passenger floorboard of appellant's pickup truck.

Appellant also admitted he lied to the police when asked when he had last seen his .357. Appellant denied asking Turner to get rid of his gun.

[Footnote 6] Appellant testified he did not know Turner, and was introduced to him the first time when Turner came with Ringler to pick him up at the police station. According to appellant, he did not ask Turner to 'get rid' of his gun because 'I didn't even know Mike Turner. I wouldn't ask somebody I didn't know to do something like that.'

Appellant denied telling Carter that he killed the Bells. According to appellant, Carter asked him whether he killed someone in Yolo County and whether he 'did the two in Vacaville.' After 'playing with [Carter's] mind' and 'having fun' with him a bit, appellant told him 'No, but they sure think I did.' Appellant claimed he fled from the police when they tried to arrest him because he "had no intentions on going to prison for three counts of murder that I didn't do."

Appellant denied confessing to Jacobitz or giving him any information about the Bells' murder. According to appellant, Jacobitz was a known 'liar'; appellant was suspicious of him because he asked too many questions about appellant's case and wanted to read all of appellant's newspaper clippings. Appellant let Jacobitz read some newspaper clippings, which Jacobitz kept for several days. However, appellant would not let Jacobitz read the police report because he mistrusted him. Appellant thought Jacobitz may have heard him talk with other inmates about how witnesses had testified at his earlier trials. Appellant testified that while in the county jail law library, Jacobitz offered to help him by having Edgar killed. Appellant rejected the offer, saying he just wanted Edgar 'to tell the truth,' i.e., that Edgar 'had been threatened' by the police to give testimony against appellant. On cross-examination, appellant admitted that he gave Edgar's address to Jacobitz. According to appellant, he "didn't think [there] was any harm" in doing so even though Jacobitz claimed to be a member of the Aryan Brotherhood and had offered to have Edgar "done in," because Jacobitz was 'a liar.'" Exh. D to Ans., pp. 20-25.

at the behest of an individual named Darryl Borelli, with whom he met, as established by several defense witnesses, at a Denny's in order to plan the homicides, that Borelli wanted Cynthia Bell killed due to a drug debt and/or "'rip off,'" and that Borelli and Hurtz made a number of incriminating admissions concerning the murders. AP, p. 59.

In their unpublished opinion, the First District Court fairly set forth the facts (RT 4136-4145), as well as their reasoning, as to this claim:

> Defense witness Pamela Marie Maples testified that Hurtz was her cousin. According to Maples, while at her sister's house in Vallejo in April 1994 she "overheard" Hurtz discussing some homicides. After the trial court sustained the prosecution's objection to the admission of Maples' testimony as to what she heard Hurtz say, the defense made an offer of proof that Maples overheard him say he had killed a man and a woman in a car in Vacaville, and was covered with blood as a result.
>
> Under questioning outside the presence of the jury, Maples testified that she was present with her sister, Hurtz, and "a guy named Steve" at a conversation in which Hurtz allegedly said he had killed a man and a woman in a car. Maples was "in and out of the room" at the time, only heard "bits and pieces" of the conversation, and never joined in it. The conversation was already underway when she came in; she did not know how long they had been discussing the murders, the context of the discussion, or whether it was "serious" or not. Nevertheless, Maples testified that Hurtz said he shot "[t]he girl" "[i]n the head" first, and "[t]then he reached over and shot the guy." Hurtz said they were in a parking place,

but did not otherwise describe the locale of the murders or the type of car the victims were in. Afterward, according to Maples' version of what Hurtz said, "he was full of blood" and "ran through a field, threw mud upon himself, and then went to make the phone call for somebody to pick him up," Maples "didn't hear" Hurtz say when the murders took place. Under cross-examination, she acknowledged that she had no idea whether the murders took place one week or 10 years before the conversation, or whether they took place in California or somewhere else.

The trial court sustained the prosecution objection, stating the defense had failed to establish sufficient foundation to permit Maples to testify as to the alleged statements of Hurtz, because there was insufficient evidence to connect the details of the incident allegedly described by Hurtz to the facts of the murders at issue in this case.

Exh. D to Answer, pp. 55-56.

APPLICABLE LAW

A criminal defendant has the right to present evidence of third party culpability if it is capable of raising a reasonable doubt about the defendant's own guilt. (*People v. Hall* (1996) 41 Cal. 3d 826, 833; *People v. Von Villas* (1992) 10 Cal. App. 4th 201, 264.) However, a trial court is not required to permit the admission of any evidence, however remote, to show a third party's culpability. "[T]here must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Hall*, supra, 41 Cal. 3d at p. 833; see also *People v. Clark* (1992) 3 Cal. 4th 41, 131; *Sandoval*, supra, 4 Cal. 4th at p. 176.)

The mere possibility that some third person committed the crime is not enough. In order to place reasonable limits on the trial of collateral issues and avoid undue prejudice to the People from unsupported jury speculation on the possible guilt of other suspects, there must be some competent and substantial proof of a probability that this actually happened. (*People v. Green* (1980) 27 Cal. 3d 1, 22, overruled on other grounds in *Hall*, supra, 41 Cal. 3d at p. 834, fn. 3; *People v. Perry* (1980) 104 Cal. App. 3d 268, 272; *People v. Whitney* (1978) 76 Cal. App. 3d 863, 869-870.) Even if a defendant's evidence is found to raise a reasonable doubt, the evidence may still be excluded in the discretion of the trial court if its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion of the issues. (§ 352; *Hall*, supra, 41 Cal.3d at pp. 829, 834, *Von Villas*, supra, 10 Cal. App. 4th at p. 265.) An appellate court should not disturb the trial court's exercise of its wide discretion in making this determination unless there has been a manifest abuse of discretion resulting in a miscarriage of justice. (*People v. Milner* (1988) 45 Cal. 3d 227, 239; *People v. Harlan* (1990) 222 Cal. App. 3d 439, 446.)

DISCUSSION: NO ABUSE OF DISCRETION

The trial court did not abuse its discretion in excluding Maples' testimony in this case. Even if her testimony was fully credited, there was simply insufficient evidence to connect the murders she heard Hurtz describe, with the ones at issue here. Although Hurtz allegedly said he shot a man and a woman sitting in a car in a "parking place," Maples did not know when or where the killing occurred, or even if Hurtz was seriously describing an act he had himself committed.

There was no mention of Cynthia or James Bell, and indeed no identification of the alleged victims' of Hurtz's murders at all.

Given the absence of any actual linkage to the charged offenses, or any other evidence supporting an inference that the killings allegedly described by Hurtz were those of Cynthia and James Bell, Maples' testimony simply did not tend to show appellant's innocence. In view of the total lack of identifying information linking the alleged uncharged offense and the charged crimes, the evidence was insufficient to raise a reasonable doubt. The trial court's ruling was an appropriate exercise of its discretion under section 352. (*Davis*, supra, 10 Cal. 4th at p. 502; *Pride*, supra, 3 Cal. 4th at p. 238; *Clark* supra, 3 Cal. 4th at pp. 132-133; *Von Villas,* supra, 10 Cal. App. 4th at pp. 266-267.)

> [Footnote 17] At any rate, no possible prejudice could have occurred to appellant as a result of the exclusion of Maple's testimony. As seen, the trial court had already permitted appellant to introduce the very similar testimony of both Harmina Ross and Eliane West regarding Hurtz's alleged confessions of shooting two unidentified people at close range while the victims were sitting in a parked car near Vacaville. Maple's testimony to similar effect was merely cumulative.

Exh. D to Answer, pp. 56-57.

Petitioner argues that the exclusion by the trial court of Maples' testimony violated petitioner's right to due process and right to present a defense. He contends that

only she could not be impeached or shown to be biased as had other third party culpability witnesses. AP, pp. 66-67. While the Supreme Court recognizes a right to present a complete defense, that right is restricted "to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973). Where the preferred evidence of third-party culpability simply affords a possible ground of suspicion against a third party and does not directly connect that person with the actual commission of the offense, the evidence may be excluded. *See People of Territory of Guam v. Ignacio*, 10 F.3d 608, 615 (9th Cir. 1993) (quoting *Perry v. Rushen*, 713 F.2d 1447, 1449 (9th Cir. 1983)).

To evaluate whether exclusion of evidence reaches constitutional proportions, the court must balance five factors: "(1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense." *Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990). A criminal defendant must demonstrate that his interest in presenting evidence in his favor outweighs the state's interest in reliable and efficient trials before a court should interfere with routine evidentiary matters. *Perry v. Rushen*, 713 F.2d 1447 (9th Cir. 1983). Only "particularly crucial and reliable evidence" will satisfy this test; "[e]vidence of little importance, whether merely cumulative or of little probative value, will almost never outweigh the state interest in efficient judicial process." *Id.* at 1453. Applying these factors to the case at bar, this court finds

that the trial court did commit constitutional error when it excluded the evidence discussed above.[20]

Evidence of her cousin's (Hurtz's) alleged remarks to her sister and another person, overheard in part by Maples, about Hurtz's involvement in the double murders are of the type generally deemed to be inherently reliable, as a declaration against interest, and such remarks would constitute, if believed, substantial evidence that another person or persons committed the crime, which was petitioner's defense. *See Chambers v. Mississippi*, 410 U.S. at 302, 93 S. Ct. at 1049. Moreover, respondent does not dispute that Maples, as Hurtz' cousin, was the only third party culpability witness who had no apparent bias.

Respondent asserts, however, that the witness' testimony would have been seriously undermined on cross-examination due to the weaknesses inherent within it. There is no doubt that the testimony would have been subject to rigorous cross-examination and the uncertainties highlighted, including that Ms. Maples did not know when or where the murders to which Hurtz was alluding occurred, that she only heard "bits and pieces" of the conversation, that she could not even be sure the conversation was serious. RT 4139, 4140, 4141-4142, 4144. However, there is a much more compelling case for relevance of the

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[20] As set forth in subsequent sections, it is difficult to understand whether the claim to be analyzed is a "preclusion of defense" or an *Estelle* evidentiary error. The court has chosen the tack that when evidence or testimony as a whole has been excluded, the better mode of analysis is the "preclusion of defense" line of authority. In those instances where not the entire testimony has been precluded, but only specific answers to specific questions, the *Estelle* evidentiary error framework is more appropriate.

testimony than the state trial and appellate courts credited. Although the offer of proof regarding Maples is in parts imprecise, certain significant points match or closely parallel some of the key circumstances of the case at issue. AP, pp. 47-48. Both victims had been shot to death; victim Cynthia Bell had been shot in the head; the victims were in a car, parked in a turnout area; evidence showed she was in the driver's seat and James Bell was in the passenger seat and that the shooter was standing outside the vehicle's driver side; testimony revealed that the shooter would have been covered in blood. *Id.*, citing RT 574, 587, 666-667, 687, 845, 848-849, 1472-1476; 1495-1521. Just how many double execution style homicides involving a female driver shot in the head and a male passenger also shot in a parked car could there be in a community proximate to the victims' murder herein? When asked where Hurtz was living some two and half years prior, which was around the time of the Bell murders in Vacaville, Maples knew that Hurtz had been living in the vicinity of Sacramento, then Fairfield. Traverse, pp. 47-48; RT 4137, 4140, 4141, 4143. Moreover, petitioner is correct that the state appellate court's reasoning that there was no "other evidence supporting an inference that the killings allegedly described by Hurtz were those of Cynthia and James Bell," is a statement that is insupportable on the record of this case no matter how narrowly it is construed where seven other witnesses (Chantelle Eittreim (via reading of transcript of prior testimony), Candida Eittreim, David Eitrreim [sic], Kenneth Keith, Harmina Ross, Eliane Patricia Ross, George W. McCleese, Jr.) specifically link Hurtz to the deaths of the Bells. AP, pp. 64-68 & fn. 91; RT 3993, 3995-3999, 4008, 4038, 4069-4070, 4088-4089, 4099, 4104-4106, 4156-4158, 4167-4175, 4230, 4247, 4249, 4435, 4439-4440, 4442-4445, 4484-4485, 4487, 4502-4503. Most

of these witnesses were either Hurtz's former girlfriends or family members of the former girlfriends. Although not all seem to have been asked, none of these witnesses appear to have testified, with the exception of Kenneth Keith, that they even knew petitioner. RT 3993-3994, 4154, 4228, 4484, 4752.

In short, the evidence of third-party culpability .... was sufficiently "crucial or reliable" to outweigh the state's interest in exclusion of untrustworthy evidence. The proffered evidence was not on its face so collateral to the issue of third party culpability that its exclusion did not violate the Sixth and Fourteenth amendments. *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038 (evidence that another person had confessed to the crime improperly excluded); *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920 1967) (testimony of convicted co-defendant which would have necessarily exonerated the defendant improperly excluded); *United States v. Armstrong*, 621 F. 2d 951 (9th Cir. 1980) (exclusion of evidence that another man, matching description of the robber, had used bait money from the robbery to purchase a car improperly excluded)). The jury should have been permitted to evaluate the testimony, which would have been subjected to probably rigorous cross-examination. For the state appellate court not to recognize the trial court's error was an unreasonable application of clearly established law as set forth by the Supreme Court.

However, the question that remains is whether or not, under *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710 (1993), the error was harmless. Under *Brecht*, it must be determined whether or not the error " 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Brecht*, 507 U.S. at 623, 113 S. Ct. at 1714. In a

case where the trial ended in a hung jury twice before and in this case where the jury was nearly deadlocked before ultimately reaching a verdict after five weeks, petitioner would have it that any error imposed a "substantial and injurious effect" on the verdict. However, petitioner himself noted that the testimony at issue was not set before the earlier juries which ended in mistrial because Maples had not been located; those two trials, nonetheless, each ended in a mistrial, without the evidence that was improperly excluded in the third trial. The court cannot help but emphasize that the previous mistrials occurred in the absence of Maples' testimony. Respondent is correct that petitioner presented a number of defense witnesses attesting to Hurtz's and Borelli's culpability. The same corroborative value attributable to Maples' testimony that is a part of the constitutional error analysis in petitioner's favor, nevertheless cuts against petitioner when determining whether the exclusion of Maples' testimony was harmful. The defense witnesses' implicating Hurtz, who were heard by the jury, were more exact and precise in their testimony and alleged far more damning detail, notwithstanding any bias and/or impeachment the prosecution was able to show. Thus, the jury did hear a good bit of evidence regarding Hurtz' alleged involvement. Moreover, respondent is correct that she could not have emerged completely unscathed by a cross-examination that would have pointed up the infirmities of her putative testimony, as noted above. While this court cannot conclude, as did the state appellate court that "no possible prejudice" could have ensued as result of the exclusion of the testimony, the court does find that there has been an insufficient showing that the improper exclusion of the testimony of Ms. Maples had a substantial and injurious

effect on the jury's verdict. Habeas relief should be denied for this claim.

E. The Trial Court Unduly Restricted Fry's Presentation of Evidence to the Jury Regarding the "Actual Killer's" (Hurtz) Prior Convictions; Hurtz Testified, and the Trial Court's Exclusion of the Evidence Regarding His Past Gave the Jury a False Impression of Hurtz

Petitioner, as respondent notes, with no briefing or discussion whatsoever attempts to incorporate this claim into his amended petition and his traverse, solely by reference to the original pro se petition, which sets forth no statutory or case authority for this putative ground for relief, and to the briefing on direct review before the state courts, which briefing references only state case law with a passing reference to the federal and state constitutions. AP, p. 84; Ans., p. 21, Traverse, p. 53, Petition pro se, p. 5(d), ;Exh. A to Ans., Appellant's Opening Brief, pp. 88-92; Exh. C, Appellant's Reply Brief, pp. 18-21; Exh. E, Petition for Review, pp. 20-21.

A bare contention, unsupported by explanation or authority, is deemed waived. *See FDIC v. Garner*, 126 F.3d 1138, 1145 (9th Cir. 1997) (claim waived when no case law or argument in support is presented); *Seattle School Dist., No. 1 v. B.S.*, 82 F.3d 1493, 1502 (9th Cir. 1996) (party who presents no explanation in support of claim of error waives issue); *see also Pelfresne v. Village of Williams Bay*, 917 F.2d 1017, 1023 (7th Cir. 1990) ("A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority . . . forfeits the point. We will not do his research for him."); *Johnson v. Indopco*, 887 F. Supp. 1092, 1096

(N.D. Ill. 1995) (finding argument unsupported by relevant authority, or by demonstration of why it is a good argument despite lack of authority, constitutes mere assertion not meriting court's attention); *Arredondo v. Ortiz*, No. CV-01-00788-ABC, 2004 WL 834782, at * 2 ("Normally we decline to address an issue that is simply mentioned but not argued [citation omitted], and we see no reason to depart from that practice in a habeas appeal.").

This ground for habeas relief, in the form of a bare and unsupported contention, presented as it is without supporting explanation, argument, or authority in this court, has, in essence, been abandoned. Having been so abandoned, the claim is mooted and must necessarily be denied.

F. In Violation of Fry's Fundamental Constitutional Right to Adduce Third Party Evidence, the Trial Court Precluded Fry from Presenting Evidence to the Jury that an Accomplice of Hurtz Had Admitted to Being in Possession of the Murder Weapon

Petitioner contends that he was unconstitutionally deprived of the opportunity to present third party culpability evidence before the jury when the trial court did not allow defense investigator, Robert Morse, to testify that a third party witness, Debra Neundorf, had admitted to being untruthful in her testimony in averring that witness Darryl Borelli, her former boyfriend and the individual on whose behalf petitioner believed Hurtz and possibly others were acting in murdering the Bells, had not told her he had possession of the murder weapon. AP, pp. 84-86. As petitioner emphasizes, his defense has always been that he did not commit the murders. AP, p. 84. Darryl Borelli

was "another local methamphetamine dealer to whom Cynthia Bell owed money." Opinion, First District Court of Appeals, Exh. D to Ans., at 27.

Borelli, *called by the defense*, testified that he took no part in the Bell murders, that he had made no statements to anyone about his having disposed of the murder weapon, that he did not have anything to do with the disappearance of petitioner's .357. AP, p. 85, RT 2794-2795, 2800. The state court of appeal summarizes the facts undergirding this claim accurately (with a minor correction noted by this court):

> Appellant next contends the trial court erred in refusing to allow him to impeach the stipulated testimony of his own defense witness Debra Neundorf by means of alleged prior inconsistent statements and statements against penal interest. Although we believe the trial court erred in its analysis of the question whether Neundorf's alleged out-of-court statements were made against her penal interest, we conclude that any possible error in denying their admission was not prejudicial.
>
> PROCEDURAL BACKGROUND
>
> Debra Neundorf was called as a defense witness at both of appellant's prior trials. The defense was unable to call her in person as a witness at this trial because she was declared unavailable, having invoked her Fifth Amendment rights due to an arrest prior to trial. The parties therefore stipulated that her testimony from the second trial could be read into evidence. Pursuant to this stipulation, Neundorf's direct, cross, redirect and recross examinations from the prior

trial were all read into the record. In that testimony, Neundorf testified that although she had previously dated Borelli, she was not dating him in October 1992; she never sold drugs to Cynthia Bell on Borelli's behalf, she never heard Borelli make threats against the Bells; Borelli never told her he was responsible for the Bells' murders or that he had the murder weapon; Borelli had never threatened her to dissuade her from testifying; and she was not afraid of Borelli. Appellant also questioned Neundorf on whether she had told defense investigator McClellan she was dating Borelli in October 1992.[21]

Several days after Neundorf's previous trial testimony was read into the record, defense counsel called one Robert Morse to impeach Neundorf with new testimony that while recently in jail custody, she told Morse she had been untruthful in her prior testimony, she was very afraid of Borelli, and Borelli had told her he had the murder weapon. The prosecutor objected on the grounds Morse's testimony about Neundorf's alleged recent statements was hearsay offered for proof of the facts asserted; Neundorf was unavailable to be cross-examined about her conversation with Morse; and, because the recent statements to Morse were made long after Neundorf's earlier trial testimony, she necessarily could not have been examined at that time so as to give her an opportunity to explain or deny her alleged subsequent statements. The trial court

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[21] According to the transcript of the testimony, petitioner's counsel had asked whether Neundorf had told Lou Kalish, a criminal investigator for the Solano County District Attorney's Office, not defense investigator McClellan, that she and Borelli were dating at the time of the homicides (October, 1992). RT 4416, 4428.

announced it would sustain the objection unless the defense could establish some legal right to present the new testimony.

> The following colloquy took place: MR. KEALY [the prosecutor]: She's not available for cross-examination on these. The Court has declared her unavailable as a witness. I don't know whether she's going to come in and say I never talked to Mr. Morse about this. She's never been asked, did you tell Mr. Morse these things.
>
> THE COURT: Okay. I'm going to sustain the objection subject to if you can find me some law. But my feeling is we declared her to be unavailable. Now, she's testified by way of stipulation from her prior trial, and I think you're stuck with that. If you have some law that says otherwise, give it to me. We'll address it . . .
>
> MR. KEALY: Your Honor, if I may, just because counsel has some case –
>
> MS. VOSS [defense counsel]: I don't understand the grounds for sustaining it. It's impeachment. Just because she's unavailable – she wasn't unavailable when this, uh, conversation took place. She said it, and she was cross-examined as to these matters.
>
> MR. KEALY: There's been no testimony cross-examined as to anything she told Mr. Morse. We read her testimony in a couple weeks ago. Apparently, if I'm right, this happened with Mr. Morse within the last week?
>
> THE WITNESS [Morse]: Yes.
>
> MR. KEALY: The last couple of days?

> THE WITNESS: Last few days. But she was cross-examined on these matters, and she said something different. This is impeachment.
>
> THE COURT: No, that wouldn't be fair. In other words, you read in the testimony and then you go investigate, get something different. She's not around, and how can the other side, whether it was one way or the other, . . . confront the witness? That's the real problem.

At a further hearing on the matter the next day, defense counsel argued Morse's testimony should he admitted on two grounds: (1) because during her previously transcribed testimony at the earlier trial Neundorf was cross-examined on similar statements concerning Borelli she allegedly made to a different defense investigator, the defense had already satisfied any confrontation requirements for the admission of her subsequent statements to Morse as prior inconsistent statements; and (2) Neundorf's alleged statements to Morse that she had been untruthful in her trial testimony were separately admissible as declarations against penal interest. The prosecutor responded that Neundorf had only been cross-examined about her earlier alleged statements to defense investigator McClellan, and had not had the opportunity to be confronted with her alleged statements to Morse. The trial court noted that "the real question" was the "fundamental fairness" of permitting one side to stipulate to the previous testimony of a witness, and then contradict that testimony with hearsay statements made after the fact while the witness was unavailable to testify.

The trial court ultimately sustained the objection, concluding that the prior inconsistent statement exception to the hearsay rule "applies only when the person whose statement is being used is a witness and has an opportunity to explain or to deny the statement." The court also noted that the hearsay statements sought to be admitted were made subsequent to her testimony, and were therefore not "prior" inconsistent statements. With respect to the question of whether they were admissible as against Neundorf's penal interest, the trial court found that Neundorf's alleged admission that she was "untruthful" in her previous trial testimony lacked any evidentiary value because it could not be ascertained whether or not the subject as to which she allegedly stated she had not told the truth constituted a "material fact."

> The trial court stated: "Now she [Neundorf] makes a statement, according to Mr. Morse that he overheard, that [']when I testified I wasn't telling the truth.['] . . . [I don't know if that would be to a material fact, to every fact, or to no fact, or to the way she spelled her name when she was asked how to spell her last name. And so I don't know what evidentiary value that has."

APPLICABLE LEGAL PRINCIPLES

[Discussion of California law]

* * *

Regardless of the merits of that argument [another argument under California law], we have concluded the trial court erred in its analysis of appellant's alternative contention that Neundorf's statements to Morse should have been

admitted under the exception for declarations against penal interest.

The trial court's stated reason for rejecting admission of Neundorf's alleged hearsay statements to Morse on this ground was that there was insufficient evidence the statements were material. According to the trial court, it was impossible to tell what evidentiary value Neundorf's statements had because it was unclear what she was referring to when she told Morse she did not tell the truth at the prior trial.

Because materiality is an element of the crime of perjury, the prosecution's failure to prove it is fatal to a perjury charge. What is at issue here, however, is not the merits of a perjury claim, but the application of a particular hearsay exception to the admission of proffered out-of-court statements. As in the case of other hearsay exceptions, the essence of the exception for statements against interest is the declarant's state of mind at the time of making the subject statements. Specifically, the rationale of the exception is based on the assumption that reasonable persons would not say deleterious things about themselves if they thought doing so would be harmful to their interests. In this context, then, the question is not whether Neundorf's statements would ultimately be adjudged "material" and perjurious as a matter of law, but whether her statements could possibly expose her to a charge of perjury and therefore be considered contrary to her penal interest.

In this case, Neundorf purportedly admitted that she lied under oath. Even if she may ultimately have been acquitted of a perjury charge, her potential exposure to arrest, pretrial detention and

criminal prosecution by itself is clearly contrary to her pecuniary interest, and certainly subjects her to the risk of criminal liability as well. Assuming Neundorf did lie under oath and admit that she had done so, it strains credulity to conclude she did not see herself at risk because she somehow had enough knowledge of criminal law to realize both that materiality was an element of the crime of perjury, and that no court would find her lies "material."

We conclude that a reasonable person in Neundorf's position would have thought of her admission of lying under oath as being against her interests, and her out-of-court statements therefore qualified for admission under that exception to the hearsay rule. Even so, the trial court could still have excluded the statements if it determined they were not sufficiently reliable or trustworthy. *(People v. Cudfo*, supra, 6 Cal. 4th at pp. 607-609; *People v. Frierson* (1991) 53 Cal.3d 730, 745.) Here, it does not appear the trial court made such a factual determination. We are loath to do so in the first instance on this appeal. Assuming the statements were sufficiently reliable, we therefore assume further that their exclusion was error.

That error, however, does not compel reversal; the question of prejudice remains. Assuming the trial court abused its discretion in barring the admission of this testimony, we may not reverse or set aside the judgment unless, in light of the entire record, we conclude the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) We cannot so conclude in this case.

The body of evidence against appellant was extensive and compelling, as we have set out in

some detail. Numerous witnesses testified appellant not only threatened the lives of the victims on several occasions during the days just before the killings, but he also acknowledged committing the murders soon afterward. At least one of the murder bullets was identified as having been fired from appellant's gun. Several witnesses saw that gun in appellant's possession both immediately before and immediately after the murders. Other than Neundorf's hearsay statement to Morse that Borelli told her he had the murder weapon, there was no other evidence Borelli ever had possession or control of the gun used to kill the victims. Even accepting Borelli's alleged statement to Neundorf at face value, there is nothing to indicate when he might have had possession of the gun, or what the circumstances of his possession were. Indeed, whether or not Borelli said he had possession of the murder weapon, nothing in appellant's proffer suggests he ever admitted committing the murders.

Finally, Neundorf's reported statements to Morse had obvious indicia of unreliability. Not only were Neundorf's statements hearsay, but they were themselves chiefly concerned with alleged double hearsay statements by Borelli concerning his supposed possession of the murder weapon. Appellant's main reason for seeking admission of this double hearsay was as proof of the facts asserted. Thus, the reliability of both Neundorf and Borelli himself was placed in issue by Morse's proffered testimony. The testimony consists of jailhouse assertions that the declarant lied under oath during her previous testimony, which assertions the defense now seeks to admit as the truth without any chance for testing by cross-examination. Given her incarceration,

> Neundorf's motives for making the supposed admissions are certainly suspect. Under all these circumstances, there is only a remote chance a reasonable jury would have given substantial weight either to Neundorf's hearsay statements to Morse, or to the double hearsay statements of Borelli that Neundorf reportedly recounted. On this record, we conclude it is not reasonably probable that a result more favorable to appellant would have occurred in the absence of the trial court's error in articulating its reasons for denying admission of this evidence. (Cal. Const., art. VI, § 13; *Cudjo*, supra, 6 Cal. 4th at pp. 612-614; *People v. Watson* (1956) 46 Cal. 2d 818, 836.)

Exh. D to Ans., pp. 58-65.

Although the state appellate court found that it was a state law evidentiary error for Neundorf's testimony to have been excluded (albeit adjudged "harmless)," that is not the analysis relevant in this court. The real federal issue is whether the exclusion of the impeachment testimony unfairly fettered petitioner's right to present a defense. And, this preclusion of defense has been discussed previously.

For the sake of efficiency, the court will assume that constitutional error occurred in not permitting the Neundorf impeachment. In assessing the *Brecht* standard,[22] the

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[22] Petitioner emphasizes that the state court erred in applying the "harmless error" standard found in *People v. Watson*, 46 Cal. 2d 818, 836, 299 P. 2d 243, 254 (1956), which requires setting aside a judgment only upon a finding that, inter alia, "the improper admission or rejection of evidence," resulted in a "miscarriage of justice" which "should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party

(Continued on following page)

court is again compelled to determine whether exclusion of this evidence had a substantial and injurious effect on the outcome of petitioner's trial, i.e., is the court's confidence in the outcome of the verdict undermined. Like the Court of Appeal, the undersigned cannot agree with petitioner. Given the circumstances, petitioner overestimates the effect of the alleged impeachment. Petitioner called the "actual killer" [or his accomplice], Borelli, as a defense witness, then *stipulated* to the offending testimony of Neundorf, and lastly attempted to overcome all this with the testimony of a defense investigator recalling the "just the other day" contradictory statements of the non-appearing witness. Probably, petitioner hoped to dirty Borelli on direct, and apply the coup de grâce to both Borelli and Neundorf with the investigator's evidence of Neundorf's deceit which would then (hopefully) also rub off on Borelli. However, a reasonable jury would not have been persuaded by what is unconfrontable hearsay (regardless of any exception). While the tactic was within the reasonable bounds of counsel competence, it was a

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would have been reached in the absence of the error." *Watson*, 46 Cal.2d at 834, 836. In arguing for the application of the *Chapman* harmless error test, petitioner concedes, correctly, that this court may be constrained to follow the prejudice inquiry set forth by *Brecht*. Traverse, p. 18. This circuit has unequivocally determined "that the Brecht standard should apply uniformly to all federal habeas corpus cases under § 2254." *Bains v. Cambra*, 204 F.3d 964 (9th Cir. 2000). The Ninth Circuit has also clarified that the *Watson* harmless error standard applied by California state appellate courts to trial errors of non-constitutional magnitude "is the equivalent of the *Brecht* standard under federal law ... whether the errors had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Bains*, 204 F.3d at 971, n. 2, citing, inter alia, *Duncan v. Henry*, 513 U.S. 364, 366, 115 S.Ct. 887 [ ] (1995) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 636-38, 113 S.Ct. 1710 [ ] (1993)).

longshot, and in light of the entire record, not all that impressive.

This claim should be denied.

G. Trial Court's Exclusion of the Prior Acts of Violence of the Actual Killer's Accomplice Violated Fry's Right to Present a Defense

For the same reason that this court finds that petitioner has waived any argument in support of claim 5, the undersigned finds that petitioner has waived any argument as to this asserted ground for relief. In his amended petition, petitioner states only that this issue has been fully briefed "during the course of direct review, and in Fry's pro se petition." AP, p. 88. In the traverse, in response to respondent's apparently unacknowledged opposition, petitioner asserts only "[t]his issue has been adequately briefed in Fry's post-conviction briefing and in the Attorney General's Answer," submitting the issue "without further briefing." Traverse, p. 61. No case authority is cited in the pro se petition as to this claim. Petition, p. 5(e). Moreover, petitioner's briefing on direct appeal to the state courts did not provide adequate argument and case authority to frame a claim that petitioner had been deprived of a federal constitutional right on this ground. Exh. A to Ans., pp. 93-100; Exh. C to Ans., pp. 22-26; Exh. E to Ans., pp. 4-8; 21-22.

As previously noted (*see* claim 5 discussion, *supra*), a bare contention, unsupported by explanation or authority, is deemed waived. *See FDIC v. Garner*, 126 F.3d at 1145; *Seattle School Dist., No. 1 v. B.S.*, 82 F.3d at 1502; *see also Pelfresne v. Village of Williams Bay*, 917 F.2d at 1023; *Johnson v. Indopco*, 887 F. Supp. at 1096. *Arredondo v.*

*Ortiz*, No. CV-01-00788-ABC, 2004 WL 834782, at * 2 (court declines to address an issue that was only mentioned but not argued). Because petitioner has not briefed this ground for relief in this court, it is a bare contention without supporting argument or authority and is deemed abandoned and/or waived. Having been waived, this claim has been rendered moot and must necessarily be denied.

H. Trial Court Violated Fry's Sixth and Fourteenth Amendment Rights by Directing the Jury to Continue Deliberating, When, after Nine Court Days of Deliberations, the Jury in the Third Trial Had Declared That it Was Deadlocked 7-5, with Nine of the Jurors Informing the Court That Further Deliberations Would Be of No Avail

Petitioner maintains that the trial judge compelled jurors, who had participated in extensive deliberations and had informed the court that, by a large majority, they believed themselves to be deadlocked, to reach a verdict in violation of petitioner's constitutional rights to due process and to a fair trial. The state court of appeal fairly sets forth the facts of this claim, with any necessary modification noted:

> On May 16, 1995, after 11 days of deliberations,[23] the jury sent the trial court a note from the foreperson stating that she believed "we are deadlocked at this point," and asking the trial court:

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[23] In his traverse, petitioner correctly notes (at least according to the record) that the jury deliberated for nine (9) days rather than 11 days prior to the jury foreperson indicating that the jury might be deadlocked. Ap, p. 62; CT 929-936; RT 5123-5154-7.

"Do you have any suggestions for us regarding what we might do to break the deadlock?" The trial court called the jury into the courtroom and asked the foreperson whether (a) if the jury continued in its deliberations, the foreperson thought there was a reasonable possibility that the jury might arrive at a verdict; and (b) whether there was anything further the trial court could do to assist the jury in arriving at a verdict. The foreperson responded that the jurors were "just looking for . . . anything that the Court might suggest that we could try to do to break, the deadlock." The trial court inquired how the jury was split, and was told that after four votes, the jury was split seven to five.

The trial court admonished the jurors that each party had a right to the jurors' own individual opinions; "everybody is entitled to their own opinion as a juror"; the jurors should "unhesitatingly change" their votes if they were shown to be wrong during deliberations; "until you are convinced that you are wrong, then you should stick to your vote"; "if a verdict can be reached, then we want a verdict to be reached"; and "[i]f a verdict can't be reached, then that's just the way it is." The trial court then polled the jury to determine whether they individually believed further deliberations would be useful. Seven jurors agreed with the foreperson that their deliberations [sic] "hopelessly deadlocked"; one "[h]esitantly" agreed; one was undecided; and two disagreed. On the basis of this poll, the trial court sent the jurors back to deliberate further, again instructing "that if you are convinced that you are wrong, then you should change, [but] if you are not convinced, . . . you should stick with you own vote. The trial court told the jurors it

would check with them the next day "as to what, if any, progress" had been made, "and if not, then we can go from there again."

At that point, the foreperson asked for further clarification of the concept of reasonable doubt. The trial court told the foreperson to reread the instruction, and added that "it's really you, as individual jurors, when you read that instruction, to apply it and then give it the meaning to which you feel it's entitled." Thereafter, the jury deliberated for two days without communicating with the court. On May 19, the jury requested a read back of some portions of trial testimony, and informed the court it had selected a new foreperson. On May 22, the trial court suggested making an inquiry about whether the jurors felt they were making progress, but the prosecutor objected on the ground that "[t]hey're obviously working," and "if they haven't brought the subject matter up with the Court, we shouldn't be bringing that up." The jury was brought in, and the new foreperson indicated the jury's willingness to continue deliberations the next day.

On June 1, the trial court sua sponte asked the jury to come into the courtroom to inquire whether there had been any progress in the deliberations. At that time, the new foreperson stated: "Yes, there has been some change." The trial court reread CALJIC No. 17.40 instructing the jury that both sides were entitled to the individual opinion of each juror; each juror was to decide the case for him or herself, after discussing the evidence and instructions with the other jurors; and although each juror was not to hesitate to change an opinion if convinced it was wrong, he or she was not to decide any question in a particular way just because a majority of the

> jurors, or any of them, might favor such a decision. Upon seeing "all affirmative nods" from the jurors in response to its question whether further deliberation would be helpful, the trial court sent them back to deliberate. On June 8, the jury returned verdicts of guilty on both counts.

Exh. D to Ans., pp. 39-41.

Although as to this claim petitioner merely incorporates by reference his pro se petition and briefing on direct appeal in his amended petition, he does brief the issue in his traverse. Traverse, pp. 62-68. The pro se petition, without citing case authority, at least raises the issues sufficiently for respondent to have adequate notice such that the belated briefing in the traverse does not unduly prejudice respondent. Petitioner emphasizes the two prior mistrials as a result of deadlocked juries; that daily deliberations in the third trial were scheduled from 9:00 a.m. to 5:00 p.m.;[24] that while evidence was presented to the jurors over 29 court days, the jury deliberated for 23 court days before reaching a verdict; that nine of the jurors on May 16, 1995, after being polled by the trial court, agreed that they were deadlocked and that further deliberations would be fruitless; that 14 of the days that jurors deliberated occurred after the majority of jurors believed the jury to he deadlocked. Traverse, pp. 62-63, CT 822-857; RT 5126, 5154-5 – 5154-8. Respondent points out that one of the nine who believed that the jury was hopelessly deadlocked expressed this belief "hesitantly"; of the remaining three jurors, one was undecided and two did not

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[24] The record indicates that jurors had a lunch break of an hour and a half scheduled. RT 5126.

believe there was a hopeless deadlock. Ans., p. 28, RT 5154-7 – 5154-8.

Petitioner cites Supreme Court authority pointing out the risk that is run if jurors are inordinately pressured to reach a verdict following a deadlock after having made exhaustive efforts. Traverse, p. 65; *Arizona v. Washington*, 434 U.S. 497, 509, 98 S. Ct. 824, 832 (1978) (if a trial court judge fails "to discharge a jury unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.").[25] Petitioner cites *Arnold v. McCarthy* for the principle that "[c]oercion of an already exhausted jury to continue deliberations may induce jurors to accommodate a verdict which they would not otherwise support." 566 F.2d 1377, 1387 (9th Cir. 1978). While the theory of petitioner's cited cases is no doubt true in the abstract, the Ninth Circuit also observed (in *Arnold v. McCarthy*) the following in assessing whether the trial court had exhibited a proper exercise of discretion in declaring a jury deadlocked:

> Upon receiving a communication from the jury that it cannot agree, the trial court must question the jury independently to determine whether further deliberations might overcome

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[25] Noting that the "public interest in fair judgments is not of recent origin," the high court quotes from an early case: "'if a jury cannot agree, we ought not to coerce them by personal suffering, nor ought we to expose the parties to the danger of a verdict which is not the result of conviction in the minds of the jury, but produced by suffering of mind or body.'" *Arizona v. Washington*, 434 U.S. at 510 n. 27, 98 S. Ct. at 832 n. 27 (quoting *The Queen v. Charlesworth*, 1 B. & S., at 503-504, 121 Eng. Rep. at 802..

> the deadlock. [Citations omitted]. Merely questioning the jury foreman may not be sufficient, but this circuit has recently held that questioning the foreman individually and the jury either individually or as a group is satisfactory.

*Id.*

In this case, the record demonstrates that in determining not to declare a mistrial upon the jury's majority declaration that they were deadlocked, this court not only spoke with the foreperson, but also polled the jurors to determine each of their positions. The judge should question the jury in such circumstances, either individually or through its foreman, on the possibility its current deadlock could be overcome by further deliberations. The trial judge did not simply direct the jury to resume deliberations without any inquiry or further direction, as was the case in *Krische v. Smith*, 662 F.2d 177 (2d Cir. 1981), cited by petitioner as grounds for granting habeas relief. Traverse, p. 65.

Petitioner notes that prior to bringing the jury back to the courtroom on June 1, 1995, the court expressed concern that a juror had remarked to a court reporter during a testimony readback that "'if they [did not] reach a verdict by July 1st, she felt she might lose her job" Traverse, p. 64; RT 5233. The fact that a juror may have been concerned about whether or not her job would be in jeopardy if a verdict (or, presumably, at least some resolution) were not reached fully a month beyond when the judge makes his remark does not appear to lend itself to coloring the deliberations as coerced.

Upon bringing the jury to the courtroom on June 1, 1995, petitioner observes that the court made the following

remark, despite the fact only two of the twelve jurors had definitively stated that the jury was not deadlocked:

> [S]ome days ago when the jury indicated that it was deadlocked, . . . the court then made certain inquiries of the jury. And after that, *the jurors had indicated to the court that they felt that further deliberation would be fruitful*, and therefore the court returned the jury for further deliberation.

Traverse, p. 64; RT 5235 [emphasis added].

While it is plain that the court would have been more accurate to say that two, or possibly three, of the jurors had indicated the further deliberation could have proved fruitful, sending the jury back for further deliberation even after it has declared itself completely deadlocked is not, of itself, tantamount to coercion. *Rodriguez v. Marshall*, 125 F.3d 739 (1997), *overruled on another ground by Payton v. Woodford*, 299 F.3d 815 (9th Cir. 2002). In *Rodriguez*, the Ninth Circuit found that the jury had not been coerced where "the jury declared itself deadlocked on four occasions, and yet the judge refused repeated defense requests to declare a mistrial." 125 F.3d at 748-749.

A court must apply a "totality of the circumstances" test when considering whether a verdict was coerced by actions of the trial court. *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 365 (2002)[26]; *Lowenfeld v. Phelps*, 484 U.S.

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[26] Compliance with *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, however, "does not demand a formulary statement that the trial court's actions and inactions were noncoercive 'individually and cumulatively.' It suffices that that was the fair import of the Court of Appeal's opinion." *Early v. Packer*, 537 U.S. at 9, 123 S. Ct. at 365.

231, 248-250, 108 S. Ct. 546, 556-557 5 (1988); *Jiminez v. Myers*, 40 F.3d 976 (9th Cir. 1994) (trial court's comments and conduct following two impasses in jury deliberations on attempted murder charge amounted to giving jury de facto *Allen* charge,[27] which instructs jurors to work toward unanimity and minority to reexamine its views, where the judge twice inquired into the jury's numerical split after they had declared that they were deadlocked, twice noted that he was looking for movement toward unanimity, and refused to grant a mistrial where both the defense and prosecution agreed that further deliberation would not be useful); *Rodriguez v. Marshall*, 125 F.3d 739 (verdict not coerced where the jury declared itself deadlocked on four occasions over the course of fifteen deliberation days and the trial judge refused repeated defense requests to grant a mistrial, trial judge commented on evidence which the jury had requested and remarked upon weaknesses in the testimony of one defense witness, and on the eleventh day of deliberations trial judge inquired into the numerical split of the jurors on the balloting and again denied a motion for a mistrial).

The state appellate court observed in this case:

> That record clearly shows the trial court did nothing to coerce the jury, and did not abuse its discretion in having the jurors continue their deliberations after inquiring into the numerical

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[27] *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154 (1896). The Supreme Court has noted: "California law, unlike federal law, prohibits the giving of a so-called Allen [ ]charge to a deadlocked jury – that is, a charge that specifically urges the minority jurors to give weight to the majority's views." *Early v. Packer*, 537 U.S. 3, 6, 123 S. Ct. 362, 364 (2002) (citing *People v Gainer*, 19 Cal.3d 835, 852, 139 Cal. Rptr. 861 (1977).

division of voting and individually polling the members in an effort to see if there was anything it could do to assist them in their deliberations to reach a verdict. The trial court made no threats or other statements that could be interpreted as exerting undue pressure on any juror; nor did it ever indicate that it was necessary for the jury to reach a verdict. The trial court never expressed an opinion on appellant's guilt or innocence of the charges; nor did it comment on the evidence. Indeed, appellant's assertions notwithstanding, the trial court specifically told the jury they were not required to return a verdict.

> [Footnote 12] The trial court stated: "If after there's a vote or two votes or three votes or, as in your case, four votes, if you are shown that you are wrong or that the evidence does not support your vote, then you should, as the law says, unhesitatingly change. [¶] But until you are convinced that you are wrong, then you should stick to your vote, and that's what was carefully pointed out by both attorneys, and that's the law that I gave you during the instructions. [¶] So with that, the question then boils down, if you wish further deliberation, and you have been in deliberation for quite a period of time – and all of you, the Court knows, were very attentive throughout the trial. We went through a long time. . . . But if a verdict can be reached, then we want a verdict to be reached. If a verdict can't be reached, then that's just the way it is. It's not to – because everybody is entitled to their own opinion as a juror."

Thus, the trial court specifically reinstructed that (a) each party had a right to the jurors' own

> individual opinions and each juror was entitled to his or her own opinion; (b) each juror was to decide the case for him or herself, after discussing the evidence and instructions with the other jurors; (c) although the jurors should "unhesitatingly change" their votes if they were shown to be wrong during deliberations, they should not decide any question in a particular way just because a majority of the jurors, or any one of them, might favor such a decision; (d) "until you are convinced that you are wrong, then you should stick to your vote"; (e) the individual jurors should interpret and apply the instructions themselves; and (f) although a verdict should be reached if possible, "[i]f a verdict can't he reached, then that's just the way it is." The trial court only had the jury continue deliberations after it became apparent that some jurors believed further deliberations would be useful, and that it would be possible to reach a verdict. On this record, the trial court's actions were clearly not coercive and not an abuse of discretion. [Citations omitted.]

Exh. D, pp. 43-44.

Again, the undersigned does not consider the issue de novo, but ascertains whether the legal conclusion of the Court of Appeal was "unreasonable." The undersigned cannot say that it was. There is no evidence that the jury members believed they had to reach a particular verdict; the trial judge did not at any time pressure the jury to do so. Although the trial judge asserted that "[i]f a verdict can be reached, then we want a verdict to be reached," he added that "[i]f a verdict can't be reached, then that's just the way it is." RT 5154-7. While he advised jurors that "if you are shown that you are wrong or that the evidence

does not support your vote, then you should, as the law says, unhesitatingly change," he also counseled that "until you are convinced you are wrong, you should stick to your vote. . . . " RT 5154-6 – 5154-7. The court further notes that petitioner did not request a mistrial. Additionally, it is constitutionally permissible for a state trial judge to inquire into the numerical division of the jury, so long as the context of the inquiry does not suggest that the jurors were coerced into changing their views. *See Locks v. Sumner*, 703 F.2d 403, 406-7 (9th Cir. 1983); *Jiminez*, 40 F.3d. at 981.[28] There is no evidence here that any juror was coerced to change his/her vote. Rather, it appears that the jurors reached an impasse at one point in a difficult case, later changed forepersons, continued to request and listen to testimony readbacks, and were ultimately able to reach unanimity. Even in light of the two earlier mistrials, and the extended deliberation period in this case, the Court of Appeal did not rule unreasonably when it found that the circumstances herein did not have a coercive impact on the jury.

Accordingly, this claim should be denied.

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[28] If this were a federal case, the trial judge's inquiry into the numerical division of the jury would have required reversal. *Brasfield v. United States*, 272 U.S. 448 (1926). Since *Brasfield's* per se rule rests on the supervisory power, it does not apply in federal habeas review. *Lowenfield v. Phelps*, 484 U.S. 231, 239-40 & n. 3 (1988); *Locks v. Sumner*, 703 F.2d 403, 406 (9th Cir.1983).

I. Trial Court Violated Fry's Sixth and Fourteenth Amendment Rights During Jury Deliberations by Editing Requested Testimony Read-backs in a Misleading Manner That Was Favorable to the Prosecution.

For the reasons set forth by the court with respect to claims 5 and 7, the court finds that petitioner has also waived this challenge to his conviction, having provided no briefing on this issue within his amended petition or traverse.[29] This abandoned claim must be denied.

## VII. CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that the petition be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

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[29] None of petitioner's briefing on direct appeal to the state courts on this issue adequately implicated federal constitutional issues. Exh. A to Ans., pp. 81-88; Exh. C to Ans., pp. 15-17; Exh. E to Ans., pp. 13-19.

DATED: May 28 2004.

/s/ Gregory G. Hollows
GREGORY G. HOLLOWS
UNITED STATES
MAGISTRATE JUDGE

**THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF CALIFORNIA**

JOHN FRANCIS FRY,

Petitioner,

vs.

CHERYL PLILER, Warden,

Respondent. /

No. CIV S-01-1580 FCD GGH P

ORDER

(Filed Aug. 27, 2004)

Petitioner, a state prisoner proceeding with counsel, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On June 2, 2004, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations. Respondent has filed a response to petitioner's objections.[1]

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

[1] Respondent was granted an extension of time to file a response to the objections by order filed on July 8, 2004.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed June 2, 2004, are adopted in full; and

2. The petition is denied.

DATED: August 26, 2004

/s/ Frank C. Damrell, Jr.
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF CALIFORNIA**

JOHN FRANCIS FRY **JUDGMENT IN A CIVIL CASE**

v. (Filed August 27, 2004)

CHERYL PLILER CASE NUMBER:
CIV S-01-1580 FCD GGH P

XX – **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF AUGUST 27, 2004.**

Jack L. Wagner,
Clerk of the Court

ENTERED: August 27, 2004

by: /s/ C. Forester
C. Forester, Deputy Clerk

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| JOHN FRANCIS FRY,<br>Petitioner-Appellant,<br>v.<br>CHERYL K. PLILER, Warden,<br>Respondent-Appellee. | No. 04-16876<br>D.C. No.<br>CV-01-01580-FCD-ST<br>MEMORANDUM*<br>(Filed Feb. 2, 2006) |

Appeal from the United States District Court
for the Eastern District of California
Frank C. Damrell, District Judge, Presiding

Argued and Submitted October 18, 2005
San Francisco, California

Before: D.W. NELSON, RAWLINSON, and BEA, Circuit Judges.

After two mistrials on account of hung juries, John Fry was convicted of two counts of first degree murder in California Superior Court.[1] His conviction was affirmed by the California Court of Appeal and the California Supreme Court. Fry's petition for federal writ of habeas corpus under 28 U.S.C. § 2254 was denied by the district court.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[1] Because the parties are familiar with the factual and procedural history we do not include them here except as necessary to explain our disposition.

We have jurisdiction under 28 U.S.C. § 2253(a) and we affirm.[2]

The exclusion of Pamela Maples' testimony involved an unreasonable application of clearly established federal law, because her testimony was "material and would have substantially bolstered [Fry's] claims of innocence." *Chia v. Cambra*, 360 F.3d 997, 1003 (9th Cir. 2004). Maples did overhear large portions of a conversation involving her cousin, Anthony Hurtz, in which Hurtz indicated that he had committed a double homicide. Because Maples did hear large portions of this conversation – and because the portions of the conversation Maples did hear involved idiosyncratic facts exactly matching the facts surrounding the murder of Cynthia and James Bell, the victims in this case – we find her testimony to be sufficiently reliable. However, even assuming constitutional error, the exclusion of Maples' testimony was harmless because it did not have "a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citation omitted).[3]

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[2] Fry is in custody pursuant to a judgment of a state court. Therefore, the writ of habeas corpus will not be granted unless the state court's adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). We review *de novo* the district court's denial of a 28 U.S.C. § 2254 petition for writ of habeas corpus. *Bailey v. Rae*, 339 F.3d 1107, 1111 (9th Cir. 2003).

[3] Fry contends that this court should not apply the *Brecht* harmless error standard because the state appellate court failed to conduct a meaningful prejudice review. We have held, however, that the *Brecht* standard applies uniformly in all Federal habeas corpus cases under

(Continued on following page)

Second, the exclusion of Robert Morse's testimony was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, because, if admissible at all, the excluded evidence was not substantive evidence of a third party's culpability in the charged homicides. Therefore, Morse's testimony was not of significant importance to Fry's third party culpability defense and its exclusion was not constitutional error. *See Chia*, 360 F.3d at 1004. Assuming constitutional error in excluding Morse's testimony, that error was harmless because it did not have a substantial and injurious effect on the outcome of the trial. *Brecht*, 507 U.S. at 637.

AFFIRMED

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***Fry v. Pliler*, No. 04-16876**
**Rawlinson, Circuit Judge, dissenting:**

I respectfully dissent from that portion of the disposition concluding that the exclusion of Pamela Maples' testimony was harmless error under *Brecht v. Abramson*, 507 U.S. 619 (1993).

Using the *Brecht* analysis, constitutional error is harmless unless it has a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638.

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§ 2254 regardless of the error standard, if any, applied by the state court. *Bains v. Cambra*, 204 F.3d 964, 976 (9th Cir. 2000); *see also Inthavong v. LaMarque*, 420 F.3d 1055, 1059 (9th Cir. 2005).

In performing the *Brecht* analysis, "we consider the record as a whole," including the strength of the State's case. *Id.*

In my view, the record as a whole militates in favor of a conclusion that exclusion of Ms. Maples' testimony substantially and injuriously affected the jury's verdict in this case.

As the district court noted, this was John Fry's third trial, with the two prior juries having failed to reach a verdict. In this third trial, even in the absence of Ms. Maples' exculpating testimony, the jury deliberated for five weeks before convicting Fry.

Ms. Maples was the only unbiased witness presented by either side. She also implicated her cousin in the murder for which Fry was on trial. Such testimony is generally recognized as having a powerful impact on jurors. *See Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (noting that testimony of a disinterested witness "would quite naturally be given much greater weight by the jury."); *see also Bailey v. Rae*, 339 F.3d 1107, 1116 (9th Cir. 2003) ("Independent corroboration of the defense's theory of the case by a neutral and disinterested witness . . . can undermine confidence in a verdict.").

Because I am convinced that the exclusion of Ms. Maples' testimony was not harmless, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| JOHN FRANCIS FRY,<br>Petitioner-Appellant,<br>v.<br>CHERYL K. PLILER, Warden,<br>Respondent-Appellee. | No. 04-16876<br>D.C. Nos.<br>CV-01-01580-FCD<br>Eastern District of<br>California, Sacramento<br>ORDER<br>(Filed Apr. 25, 2006) |

Before: D.W. NELSON, RAWLINSON, and BEA, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges D. Nelson and Bea have voted to deny the petition for panel rehearing. Judge Bea has voted to deny the petition for rehearing en banc, and Judge D. Nelson so recommends. Judge Rawlinson has voted to grant both the petition for panel rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for an en banc hearing and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b). The petition for panel rehearing and the petition for rehearing en banc are DENIED.

Supreme Court of the United States

John F. FRY

v.

PLILER, Warden

**No. 06-5247**

Dec. 7, 2006.

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to Question 3 presented by the petition.

No. 06-5247

FILED
JAN 18 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

# Supreme Court of the United States

JOHN F. FRY,

*Petitioner,*

v.

CHERYL K. PLILER, Warden,

*Respondent.*

**On A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF FOR PETITIONER

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## QUESTIONS PRESENTED

If constitutional error in a state trial is not recognized by the judiciary until the case ends up in federal court under 28 U.S.C. § 2254, is the prejudicial impact of the error assessed under the standard set forth in *Chapman v. California*, 386 U.S. 18 (1967), or that enunciated in *Brecht v. Abrahamson*, 507 U.S. 619 (1993)? Does it matter which harmless-error standard is employed? And, if the *Brecht* standard applies, does the petitioner or the State bear the burden of persuasion on the question of prejudice?

## LIST OF PARTIES

Petitioner, John Francis Fry, is represented by Victor S. Haltom, Esq., of Sacramento, California.

Respondent, Cheryl K. Pliler, a warden in the California Department of Corrections, is represented by Deputy Attorney General Ross C. Moody, of San Francisco, California.

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## BRIEF FOR PETITIONER

## OPINIONS BELOW

The opinion of the court of appeals is unreported, J.A. 211-214, but is available at *Fry v. Pliler*, 2006 U.S. App. LEXIS 2694, 2006 WL 249542 (CA9 2006). The order of the court of appeals denying Mr. Fry's petition for rehearing and suggestion for rehearing en banc is unreported. J.A. 215.

The memorandum of findings and recommendations prepared by the magistrate judge, J.A. 114-207, which was adopted in full by the district court, is unreported. J.A. 208-210.

## JURISDICTION

The opinion of the court of appeals was issued on February 2, 2006. J.A. 211. The order of the court of appeals denying Mr. Fry's petition for rehearing was entered on April 25, 2006. J.A. 215. The judgment of the court of appeals was filed on May 5, 2006. Pet. App. 7a. The petition for a writ of certiorari was filed on June 20, 2006, and was granted on December 7, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2, cl. 3 of the Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ."

Article VI of the Constitution provides, in pertinent part, that the "Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. . . ."

The Compulsory Process Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ."

The Sixth Amendment also provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

The text of 28 U.S.C. § 2254 is set forth in an appendix to this brief.

## STATEMENT

John Fry was tried three times in the California state courts for the murder of two individuals. J.A. 114, 121, 211. The first two trials ended when evenly divided juries could not reach verdicts. J.A. 121. While the third trial was underway, Mr. Fry's trial attorney discovered a witness, Pamela Maples, who had heard her cousin, Anthony Hurtz, admit that he was the perpetrator. J.A. 6-24. However, the trial court refused to allow Ms. Maples to testify before the jury. J.A. 14-17. Notwithstanding the

exclusion of Ms. Maples' testimony, the third jury labored through five weeks of deliberations, and at one point declared itself deadlocked 7-5, before returning a guilty verdict. J.A. 114, 121.

The state appellate courts, in which Mr. Fry challenged the constitutionality of the trial judge's exclusion of Ms. Maples' testimony, concluded the trial court's ruling was proper. J.A. 94-97, 113. Every federal judge who has considered the issue on habeas review, however, has concluded that Ms. Maples' proffered testimony was reliable and that its exclusion was constitutional error. J.A. 178-180, 208-209, 212-214. Yet, the constitutional violation has been deemed non-prejudicial based upon determinations that a) the applicable harmless-error standard is the standard established by this Court in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), J.A. 180-182, 208-209, 212-213; and b), using the *Brecht* standard, the exclusion of Ms. Maples' testimony implicating her cousin did not have a substantial and injurious effect on the jury's verdict. J.A. 180-182, 208-209, 212.

Because neither the state nor federal courts assessed the prejudicial impact of the unconstitutional exclusion of Ms. Maples' testimony under *Chapman v. California*, 386 U.S. 18 (1967), this case presents the question whether *Brecht* is the appropriate standard here. This question is especially germane given that the constitutional violation in this case "directly affect[ed] the ascertainment of guilt. . . . " *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

Additionally, because the burden to demonstrate prejudice was erroneously placed upon Mr. Fry in § 2254[1] proceedings below, J.A. 180-182, 208-209, this case involves consideration of the proper allocation of the burden of persuasion or "the risk of non-persuasion." *O'Neal v. McAninch*, 513 U.S. 432, 447 (1995) (Thomas, J., dissenting). Finally, given that it took three trials for the State to convict Mr. Fry, J.A. 67, 114, 211, 214, with extraordinarily lengthy and contentious deliberations in the third trial, J.A. 121, 195-197, 214, this case presents the question whether the unconstitutional exclusion of Ms. Maples' reliable and unbiased testimony directly implicating her cousin can be deemed non-prejudicial under any principled standard of review.

### A. Procedural Background

Mr. Fry was tried by jury three times in the Superior Court of Solano County, California, on two counts of murder. *See* California Penal Code § 187. After the jury in the third trial returned a guilty verdict, J.A. 114, 121, the trial court sentenced Mr. Fry to life imprisonment without the possibility of parole. J.A. 25, 114.

### B. The Underlying Facts

Shortly after 6:00 a.m., on October 27, 1992, the bodies of James and Cynthia Bell were found in a vehicle parked on a dirt shoulder next to a highway in northern California. They had both been shot to death. J.A. 26, 122-123.

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[1] 28 U.S.C. § 2254.

As discussed below, evidence adduced at trial by the prosecution linked Mr. Fry to the double homicide. The defense presented evidence that another person was the perpetrator, but the prosecution countered with testimony that the third-party-guilt evidence was unreliable. Although Mr. Fry proffered reliable, unbiased testimony that someone other than him was indeed the perpetrator, the trial court excluded the testimony.

### *1. The Evidence Against Mr. Fry*

Mr. Fry frequently sold methamphetamine to Cynthia Bell, and at the time of her death, she was in debt to him. J.A. 33-34, 50, 71, 169. There was testimony that Mr. Fry was upset about this debt and that he had threatened to kill Ms. Bell. J.A. 33, 127, 137. Witnesses described seeing a vehicle similar to Mr. Fry's near the crime scene shortly before the Bells' bodies were discovered. J.A. 28, 49. Certain witnesses, including Mr. Fry's brother, testified that they had seen Mr. Fry "spotted with blood" at a time close to when the murders occurred, and that Mr. Fry had admitted killing the Bells. J.A. 38, 71, 136, 140.[2] A criminalist called

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[2] However, Mr. Fry's brother, who testified under a grant of immunity, admitted that he had been threatened by police in connection with this case. J.A. 166; *see also* pages 2145, 2153-2154, and 2222 of the Reporter's Transcript of trial proceedings (hereinafter "Tr."), which has been lodged with the district court in Eastern District of Calif. Docket No. CV-01-01580-FCD-GGH-P. Additionally, Mr. Fry and his brother are not fond of one another. J.A. 166.

As to the other prosecution witnesses who testified that Mr. Fry had made incriminating statements, there was evidence that a) they had been threatened and coerced by law enforcement, or b) were otherwise unreliable. J.A. 143-146; Tr. 1715-1716, 1977-1978. For example, one of the witnesses was a notorious "jailhouse snitch." J.A. 41-43, 54-55. Law enforcement threatened another witness that she would be charged with

(Continued on following page)

by the prosecution testified that a gun owned by Mr. Fry was the murder weapon. J.A. 44.[3] Further, Mr. Fry fled from police when they attempted to arrest him. J.A. 71.

### 2. *The Admitted Evidence That the Murders Were Committed by Someone Other Than Mr. Fry*

A disinterested commercial truck driver from Missouri testified that he saw the shootings occur and that Mr. Fry was not the perpetrator. J.A. 56-57, 167-168.[4] An employee of the business at which the truck driver subsequently made a delivery testified that the driver looked like he had seen "a ghost" and that he was "very distraught." J.A. 67.[5]

Other witnesses testified that Anthony Hurtz, a known drug dealer, J.A. 168, had confessed to killing the Bells. J.A. 61-64, 179. However, the prosecution impeached

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murder along with Mr. Fry and that she would lose custody of her children if she did not testify against him. J.A. 146; Tr. 1977-1978.

[3] However, a defense ballistics expert, whom the prosecutor conceded to be credible, testified that Mr. Fry's gun could not be identified as the murder weapon. J.A. 49; Tr. 5109.

[4] At the time of the incident, Mr. Fry was 6'2", weighed 300 pounds, and was bald. *See* pages 427, 436-438, 519-520 of the Excerpts of Record in proceedings below in Ninth Cir. Case No. 04-16876. According to the truck driver, the shooter had a full head of hair and was "half the size" of Mr. Fry – approximately 5'6" to 5'8" and 140 pounds. J.A. 56.

[5] The prosecution attempted to undermine this evidence by questioning whether the homicides could have occurred at the time the truck driver claimed. J.A. 66-67. However, the prosecution adduced no evidence that this witness, who did not know Mr. Fry, or for that matter, anybody involved in the case, J.A. 56, 167-168; Tr. 4576, had any reason to testify falsely.

these witnesses with evidence of bias and prior inconsistent statements. For example, "[m]ost of these witnesses were either Hurtz's former girlfriends or family members of the former girlfriends." J.A. 179-180. One of the former girlfriends bluntly testified that she did not like Mr. Hurtz. J.A. 62; Tr. 4004. Another testified that her last contact with Mr. Hurtz ended with a "confrontation." Tr. 4160. The prosecution also adduced evidence that three of the witnesses had previously "lied" to police and/or had told police that they had not heard Mr. Hurtz confess. J.A. 63-64, 66; Tr. 4072, 4910. The California Court of Appeal characterized the testimony of these witnesses as "flimsy[,]" "ambiguous[,]" "self-contradictory[,]" and otherwise lacking in credibility. J.A. 73.[6]

In addition to these witnesses, Mr. Fry presented evidence that shortly before the Bells were killed, witnesses overheard the Bells talking on a pay phone and mentioning the name "Leroy." J.A. 28, 125; Tr. 1617-1618, 1621. Although James Bell's middle name was "Leroy," Mr. Hurtz goes by the nickname "Leroy." J.A. 28, 61, 125.[7]

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[6] Mr. Hurtz, who was called to testify by the defense, claimed he was not involved in the homicides and denied he had ever told anyone he was involved. J.A. 61; Tr. 2773-2774, 2777-2779.

[7] The defense also offered evidence that, after the homicides, another individual, who the defense contended was involved with Mr. Hurtz in the homicides, Tr. 525, 553-554, was in possession of Mr. Fry's gun, which, according to the prosecution, was the murder weapon. However, the trial court excluded this evidence. J.A. 98-101; Tr. 4762, 4772, 4847-4848. The California Court of Appeal held this ruling was erroneous, but that the error was not prejudicial. J.A. 98, 106-107.

### 3. *The Key Excluded Corroborating Evidence That the Murders Were Committed by Someone Other Than Mr. Fry*

As indicated above, the trial court refused to allow Mr. Fry to present to the jury the testimony of the only known unbiased witness who heard Mr. Hurtz confess to the murder of the Bells. J.A. 6-17, 167-180, 214. This witness was Mr. Hurtz's cousin, Pamela Maples. J.A. 7, 19. She did not know Mr. Fry. J.A. 7.[8]

Ms. Maples had "overhear[d] large portions of a conversation . . . in which Hurtz indicated that he had committed a double homicide." J.A. 212. "[T]he portions of the conversation Maples did hear involved idiosyncratic facts exactly matching the facts surrounding the murder of Cynthia and James Bell. . . . " J.A. 212. Thus, Ms. Maples' expected testimony strongly corroborated the evidence provided by the less reliable witnesses regarding Mr. Hurtz's incriminating statements. J.A. 179. Nevertheless, after a hearing in which Ms. Maples testified outside the presence of the jury, J.A. 6-17, the trial judge ruled that there was insufficient evidence to conclude that the double murder Ms. Maples heard Mr. Hurtz describing was the double murder with which Mr. Fry was charged. J.A. 14-17,

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[8] With respect to the evidence concerning Mr. Hurtz's confessions, the district court noted that "respondent does not dispute that Maples, as Hurtz'[s] cousin, was the only third party culpability witness who had no apparent bias." J.A. 178; *see also* Br. in Opp. to Petition at 7.

95.[9] Hence, the jury never heard this exculpatory evidence.[10]

### C. Direct Review in State Court

Following his conviction, Mr. Fry appealed to the California Court of Appeal, First Appellate District. He presented a number of assignments of error, including a claim that the trial court had violated his constitutional rights by excluding Ms. Maples' proffered testimony regarding her cousin's confession to the double homicide.

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[9] This conclusion is refuted by the record, which reveals uncanny similarities between Ms. Maples' proffered testimony and the evidence adduced at trial concerning the circumstances of the victims' deaths: First, Ms. Maples heard Mr. Hurtz say he shot a female and a male who were in a car. J.A. 11, 15. The record reveals that Cynthia and James Bell died as a result of gunshot wounds inflicted while they were in a car. J.A. 26-27. Second, Ms. Maples heard Mr. Hurtz say he shot the female victim in the head, and that he then reached over and shot the male. J.A. 12. Evidence was adduced at trial that Ms. Bell, who was found in the driver's seat, died due to a gunshot wound to the head, and Mr. Bell was found shot to death in the passenger seat of a vehicle. The shooter was standing outside the driver's side of the vehicle when the shots were fired. J.A. 26-27; Tr. 1521. Third, Ms. Maples heard Mr. Hurtz describe the area of the shooting as a "parking place." J.A. 12. The bodies of the Bells were found in a "turnout" where motorists often park. J.A. 26; Tr. 845, 848-849. Fourth, Ms. Maples heard Mr. Hurtz say he was covered in blood after the shooting. J.A. 12. Trial testimony revealed that the shooter would have been covered in blood. Tr. 666-667, 1497, 1500, 1504. Fifth, Ms. Maples knew that Mr. Hurtz had resided in Fairfield, California. J.A. 15. The homicides occurred in Vacaville, California, Tr. 574, which, as noted in *Montgomery v. Superior Court of Solano County*, 46 Cal.App.3d 657, 661, 121 Cal.Rptr. 44, 47 (1975), is located ten miles away from Fairfield.

[10] Ms. Maples did not testify in either of Mr. Fry's first two trials. J.A. 181. Indeed, Mr. Fry's investigator did not locate and interview Ms. Maples until March 16, 1995, J.A. 18-24, at which time Mr. Fry's third trial was already underway.

J.A. 94. The state appellate court "found that the exclusion of Maples'[ ] testimony did not violate state law. . . . " Br. in Opp. to Petition at 2; J.A. 94-97.[11] In support of this conclusion, the court stated that there was no "other evidence supporting an inference that the killings allegedly described by Hurtz were those of Cynthia and James Bell. . . . " J.A. 97. Although the court acknowledged Mr. Fry's assignment of constitutional error concerning the exclusion of Ms. Maples' testimony, J.A. 94, it did not address the federal component of the claim. J.A. 94-97.

The court also stated in a footnote that "no possible prejudice" could have resulted from the exclusion of Ms. Maples' testimony because the jury heard evidence concerning other confessions made by Mr. Hurtz. J.A. 97. This conclusion, however, is directly at odds with the court's determination that the other testimony regarding Mr. Hurtz's confessions was "flimsy[,]" "ambiguous[,]" "self-contradictory[,]" and otherwise lacking in credibility. J.A. 73.

In any event, it is clear the state court did not consider prejudice under the *Chapman* standard. Indeed, "[t]he state opinion does not refer to the standard for harmless error established in *Chapman*. . . . " Br. in Opp. to Petition at 2; J.A. 94-97, 173-176. Furthermore, the state appellate court relied upon California case law,

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[11] The court based its state law determination on a finding that the trial court had appropriately exercised its discretion in excluding the evidence under California Evidence Code § 352, J.A. 97, which "is the rough equivalent of Federal Rule of Evidence 403. . . . " *Fowler v. Sacramento County Sheriff's Dep't.*, 421 F.3d 1027, 1033 n. 4 (CA9 2005); *People v. Hall*, 41 Cal.3d 826, 835, 718 P.2d 99, 226 Cal.Rptr. 112 (1986).

under which a prejudice inquiry much less demanding than *Chapman* is applied to assess the effect of the erroneous exclusion of third party culpability evidence. J.A. 95-97 (citing *People v. Hall*, 41 Cal.3d 826 (citing in turn *People v. Watson*, 46 Cal.2d 818, 299 P.2d 243 (1956), *cert. denied sub nom. Watson v. Teets*, 355 U.S. 846 (1957)); *see* 6 B. Witkin & N. Epstein, *California Criminal Law*, Reversible Error § 7 (3d ed. 2000).

The state appellate court affirmed Mr. Fry's conviction, and his petition to the California Supreme Court for discretionary review was summarily denied. J.A. 112-113.

### D. § 2254 Proceedings in the District Court

Mr. Fry filed a habeas petition in the United States District Court, Eastern District of California, pursuant to 28 U.S.C. § 2254. The case was referred to a magistrate judge, who issued a 65-page memorandum of findings and recommendations. J.A. 114-207. At the outset of his memorandum, the magistrate judge stated that Mr. Fry had come "close to demonstrating actionable error in some of his various claims. . . . " J.A. 114. As to the merits of Mr. Fry's claim regarding the exclusion of Ms. Maples' testimony, the magistrate judge concluded that the ruling violated Mr. Fry's Sixth and Fourteenth Amendment rights. Furthermore, the magistrate judge determined that the state court decision rejecting Mr. Fry's claim was an unreasonable application of this Court's clearly established law. J.A. 180 (citing *Chambers v. Mississippi*, 410 U.S. 284; *Washington v. Texas*, 388 U.S. 14 (1967)). This conclusion was based on the magistrate judge's determination that the California Court of Appeal's statement that there was no "other evidence supporting an inference that

the killings allegedly described by Hurtz were those of Cynthia and James Bell[,]" J.A. 97, was "insupportable on the record of this case no matter how narrowly it is construed where seven other witnesses . . . specifically link Hurtz to the deaths of the Bells." J.A. 179. The magistrate judge also held Ms. Maples' proffered testimony was "reliable," and noted the State had conceded Ms. Maples "was the only third party culpability witness who had no apparent bias." J.A. 179-180.

In the final analysis, however, the magistrate judge concluded the constitutional error did not warrant a grant of federal habeas relief:

> While this court cannot conclude, as did the state appellate court[,] that 'no possible prejudice' could have ensued as a result of the exclusion of the testimony, the court does find that there has been an insufficient showing that the improper exclusion of the testimony of Ms. Maples had a substantial and injurious effect on the jury's verdict.

J.A. 181-182.

The district court adopted in full the findings and recommendations of the magistrate judge. J.A. 208-210.

### E. Proceedings in the Court of Appeals

A divided panel of the Ninth Circuit affirmed. J.A. 211-214. The panel majority recognized that the state judge who presided over Mr. Fry's third jury trial had erroneously excluded "reliable" evidence that somebody else confessed to the murder Mr. Fry was convicted of committing. J.A. 212. Although the majority held the trial court's exclusion of the reliable third party culpability

evidence constituted an objectively unreasonable application of clearly established federal law, and that the evidence "would have substantially bolstered [Mr.] Fry's claim[] of innocence[,]" it concluded the error was harmless under *Brecht v. Abrahamson*, 507 U.S. at 637. J.A. 212 (internal quotation marks and brackets omitted). However, aside from quoting the "substantial and injurious effect" test of *Brecht*, the panel majority did not explain why it deemed the exclusion of "reliable" evidence of a third party's confession to be harmless. J.A. 212.

Adhering to circuit precedent, the panel majority rejected Mr. Fry's argument that *Chapman* rather than *Brecht* was the appropriate standard due to the state courts' failure to conduct *Chapman* harmless-error review. J.A. 212-213 (citing *Bains v. Cambra*, 204 F.3d 964, 976 (CA9), *cert. denied*, 531 U.S. 1037 (2000)). Additionally, although Mr. Fry contended the district court had improperly allocated to him the burden of persuasion on the question of prejudice, *see* pages 58-59 of Appellant's Opening Brief ("AOB"), Ninth Cir. Docket No. 04-16876, the Ninth Circuit majority failed to discuss the issue.

Judge Rawlinson dissented. She believed the "record as a whole militates in favor of a conclusion that exclusion of Ms. Maples' testimony substantially and injuriously affected the jury's verdict in this case." J.A. 214. Judge Rawlinson offered the following reasons for this conclusion: "[T]his was John Fry's third trial, with the two prior juries having failed to reach a verdict. In this third trial, even in the absence of [the excluded] exculpating testimony, the jury deliberated for five weeks before convicting [Mr.] Fry." J.A. 214. Pamela Maples, who would have testified that she heard her cousin confessing to the crime, "was the only unbiased witness presented by either side."

J.A. 214. "Such testimony is generally recognized as having a powerful impact on jurors." J.A. 214 (citing *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986)). Thus, Judge Rawlinson was "convinced that the exclusion of Ms. Maples' testimony was not harmless. . . ." J.A. 214.

Mr. Fry's petition for rehearing en banc was denied. J.A. 215. This Court granted certiorari. J.A. 216.

## SUMMARY OF ARGUMENT

The constitutional error that occurred during Mr. Fry's third jury trial struck at the heart of the guilt/innocence determination the jury was called upon to make. The trial judge excluded evidence that someone other than Mr. Fry had confessed to the murder for which Mr. Fry is now imprisoned. If the state trial court had allowed Ms. Maples to testify regarding Mr. Hurtz's confession, and if the jury had credited her testimony, Mr. Fry would have been acquitted. Because it is undisputed that Ms. Maples was an unbiased witness who did not know Mr. Fry, it is a highly probable that the jury would have credited her testimony.

Although Mr. Fry pressed his claim of constitutional error in the state courts, they failed to recognize the constitutional violation and did not conduct the appropriate harmless-error analysis. In federal habeas proceedings, every judge who has considered the issue has found a constitutional violation and has characterized the state judiciary's treatment of the issue as objectively unreasonable given the reliability of the excluded third-party-guilt evidence. Yet, all but one of these federal judges have erroneously concluded, under the relatively deferential

harmless-error standard set forth in *Brecht*, that the error was not prejudicial.

The district court reached its conclusion that the error was not prejudicial under *Brecht* by requiring Mr. Fry to establish prejudice and finding that he had made an insufficient showing. The Ninth Circuit concluded that the error was not prejudicial under *Brecht*, without addressing Mr. Fry's assignment of error concerning the district court's misallocation of the burden of persuasion.

*Brecht*, however, is not applicable in Mr. Fry's case. Because the state courts did not even acknowledge that an error, much less a constitutional error, had occurred, they did not review the effect of the error under the *Chapman* standard. As a result, the justification offered in *Brecht* for using the substantial and injurious effect standard rather than *Chapman*'s more rigorous harmless-error standard does not apply. The holding in *Brecht*, that federal habeas courts are to employ a more deferential harmless-error standard, is premised on the notion that state reviewing courts can be relied upon to identify federal constitutional error and to assess the impact of such error under *Chapman*. However, in a case where that premise does not hold true, there is no reason for a federal habeas court to extend the deference mandated by *Brecht*, i.e., there is no reason to extend deference to a state court harmless-error review that never occurred.

The importance of *Chapman* review is particularly evident in a habeas case such as this one, in which constitutional error, ignored in state post-conviction proceedings, does not merely cast doubt on the fairness of the litigation or on the question of whether a constitutional value has been appropriately protected, but rather casts doubt on

the reliability of the guilt determination itself. Application of *Brecht* in such a case increases the possibility that the conviction of an innocent person will be left unremedied.

Regardless of which harmless-error standard is applied here, Mr. Fry's conviction cannot stand. This is so, because: 1) the constitutional error here consisted of the exclusion of reliable testimony that someone else committed the murders; 2) the evidence in the case was otherwise closely balanced on the question of who committed the double murder; 3) there were two prior, evenly-split hung juries; and 4) the deliberations in the third trial were contentious and extraordinarily lengthy, resulting in a verdict only after the third jury had once declared itself deadlocked 7-5. In light of these circumstances, even if the *Brecht* standard governs, the exclusion of Ms. Maples' testimony substantially influenced the jury's verdict.

## ARGUMENT

### I. WHERE RELIABLE EVIDENCE OF INNOCENCE HAS BEEN UNCONSTITUTIONALLY EXCLUDED FROM A CRIMINAL TRIAL, AND WHERE STATE REVIEWING COURTS HAVE FAILED TO ACKNOWLEDGE THE ERROR, A FEDERAL HABEAS COURT MUST ASSESS THE EFFECT OF THE ERROR UNDER *CHAPMAN V. CALIFORNIA*.

The selection of a harmless-error standard may be outcome-determinative in certain cases. *Chapman*, 386 U.S. at 22 (application of an insufficiently rigorous harmless-error standard "can work very unfair and mischievous results"); 5 W. LaFave, J. Israel, & N. King, *Criminal Procedure* § 27.6, p. 412 (2007 Supp.) ("Harmless error

principles, it has been said, may determine the outcome of more criminal appeals than any other doctrine.") (internal quotation marks omitted); *see also Brecht*, 507 U.S. at 644 (White, J., dissenting) ("the fate of one in state custody" pursuant to a conviction "tainted by a constitutional violation" could turn on harmless-error standard selected by reviewing court).

In *Chapman*, this Court established the harmless-error standard for constitutional violations. 386 U.S. at 24. Pursuant to *Chapman*, a constitutional error is not harmless unless the state, "the beneficiary" of the error, proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.*; *United States v. Dominguez Benitez*, 542 U.S. 74, 82 n. 7 (2004); *Fontaine v. California*, 390 U.S. 593, 596 (1968) (*per curiam*). This standard was chosen because, while it does not require "setting aside convictions for small errors or defects that have little, if any likelihood of having changed the result of the trial," *Chapman*, 386 U.S. at 22, it does ensure that constitutional violations "that affect substantial rights of a party" are not tolerated. *Id.* at 23 (internal quotation marks omitted). While the more forgiving *Kotteakos*[12] "substantial and injurious effect" standard applies on federal habeas review, *Brecht*, 507 U.S. at 638, that standard is appropriate only if the *Chapman* standard was correctly applied by the state courts. In Mr. Fry's case, where reliable evidence of third-party guilt was unconstitutionally excluded, and where no *Chapman* review was conducted in state court, J.A. 94-97, 113, *Brecht* is inapplicable.

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[12] *Kotteakos v. United States*, 328 U.S. 750 (1946).

### A. Background – The Leading Harmless-Error Decisions

In this Court's harmless-error jurisprudence, standards for gauging whether errors warrant reversal of criminal convictions have been set forth in three seminal decisions: *Kotteakos v. United States*, *supra*; *Chapman v. California*, *supra*; and *Brecht v. Abrahamson*, *supra*.[13] The standards established in these cases are context-dependent, with variances attributable to the nature of the error at issue and the stage of post-conviction proceedings at which the error is being considered. J. Blume & S. Garvey, *Harmless Error in Federal Habeas Corpus After Brecht v. Abrahamson*, 35 Wm. & Mary L. Rev. 163, 163-164 (1993).

In *Kotteakos v. United States*, 328 U.S. 750, this Court established the harmless-error standard to be applied in criminal cases involving nonconstitutional error(s). *United States v. Lane*, 474 U.S. 438, 446 (1986); W. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 14 n. 46 (1997). Acknowledging that such a standard "cannot ever be wholly imprisoned in words," 328 U.S. at 761, this Court nevertheless explicated the relevant considerations:

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. . . . But if one

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[13] *See also United States v. Dominguez Benitez*, 542 U.S. at 86 (Scalia, J., concurring) (noting additional decisions in which variant harmless-error standards have been adopted for particular issues).

> cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

*Id.* at 764-765 (footnote omitted). The question is "what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting." *Id.* at 764. Applying this standard, "it is not the appellate court's function to determine guilt or innocence." *Id.* at 763.

In *Chapman*, the petitioners were convicted in a state jury trial in which *Griffin* error occurred. 386 U.S. at 18-20.[14] On direct review, this Court rejected the petitioners' argument that such error is reversible *per se*, and instead held "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.* at 21-22. However, "[i]n fashioning a harmless-constitutional-error rule," this Court was mindful "that harmless error rules can work

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[14] *Griffin* error occurs when a jury is invited, usually by a prosecutor, to draw an adverse inference from a defendant's exercise of his/her Fifth Amendment right not to testify at trial. *Griffin v. California*, 380 U.S. 609 (1965).

very unfair and mischievous results. . . . " *Id.* at 22. Thus, this Court held "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. "[C]onstitutional errors that affect substantial rights of a party" cannot satisfy this standard. *Id.* at 23 (internal quotation marks omitted) (citing *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). The reviewing court must look to "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24. Applying this standard in *Chapman*, this Court concluded the error in that case could not be treated as harmless because, although there was a "reasonably strong" case against the petitioners, the prosecution made repeated improper references to the petitioners' failure to testify, accompanied by an overarching suggestion that the jury could infer guilt from the petitioners' silence. *Id.* at 25. Absent this constitutional error, this Court could not say that "honest, fair-minded jurors might very well have brought in not-guilty verdicts." *Id.* at 25-26.

The *Chapman* standard is "[c]onsistent with the jury-trial guarantee." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). Indeed, the question a reviewing court is to consider under *Chapman* "is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Id.* (citing *Chapman*, 386 U.S. at 24). "The inquiry, in other words, is . . . whether the guilty verdict rendered in *this* trial was surely unattributable to

the error." *Id.* (italics in the original).[15] "That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee." *Id.*

After more than twenty-five years of applying the *Chapman* standard to constitutional error in criminal cases, this Court held in *Brecht* that "[t]he *Kotteakos* harmless-error standard is better tailored to the nature and purpose of collateral review than the *Chapman* standard, and application of a less onerous harmless-error standard on habeas promotes the considerations underlying our habeas jurisprudence." 507 U.S. at 623. However, this holding cannot be divorced from its context.

The petitioner in *Brecht* had been convicted of first-degree murder in a jury trial in Wisconsin. *Id.* at 624-625. On appeal, the Wisconsin Court of Appeals concluded that a *Doyle* violation[16] in the petitioner's trial was "sufficiently 'prejudicial' to require reversal." *Id.* at 626. However, the Wisconsin Supreme Court reinstated the conviction, concluding that the constitutional error was harmless beyond a reasonable doubt under *Chapman*. *Id.*

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[15] "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything the jury considered on the issue in question. . . . " *Yates v. Evatt*, 500 U.S. 391, 403 (1991), *disapproved on other grounds in Estelle v. McGuire*, 502 U.S. 62, 72 n. 4 (1991).

[16] *Doyle v. Ohio*, 426 U.S. 610 (1976) (holding that due process forbids comment on a defendant's silence after the police have admonished the defendant pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966)).

The petitioner then sought federal habeas relief. The district court granted the writ, determining that the State's case against the petitioner had not been "overwhelming," and thus the state supreme court's holding that the *Doyle* violation was harmless was erroneous. 507 U.S. at 626. The Seventh Circuit reversed, holding that a) the effect of a *Doyle* error was most appropriately assessed under the *Kotteakos* standard, and b) there was no basis for a finding of prejudice using that standard. *Id.* at 626-627.

This Court granted certiorari to resolve a conflict between the courts of appeals "on the question whether the *Chapman* harmless-error standard applies on collateral review of *Doyle* violations." *Brecht*, 507 U.S. at 627; *see also id.* at 647 (White, J., dissenting) (noting that the parties' arguments had focused on the harmless-error standard applicable to *Doyle* error and violations of other "so-called 'prophylactic' rules"). Adverting to the pre-AEDPA version of § 2254 which was in effect at the time, this Court observed that the statute was "silent" regarding the applicable standard of harmless-error inquiry. *Id.* at 631. Accordingly, this Court found it necessary to determine the appropriate standard by reference "to the considerations underlying [this Court's] habeas jurisprudence. . . . " *Id.* at 633.

First, the majority observed "that collateral review is different from direct review[,]" *id.*, and that "the writ of habeas corpus has historically been regarded as an extraordinary remedy[.]" *Id.* This Court also acknowledged the State's "interest in the finality of convictions that have survived direct review within the state court system." *Id.* at 635. Further, this Court stated that " 'liberal allowance of the writ . . . degrades the prominence of the trial itself,' "

*id.* (quoting *Engle v. Isaac*, 456 U.S. 107, 127 (1982)), and that "[r]etrying defendants whose convictions are set aside also imposes significant 'societal costs,'" including financial burdens and the difficulties inherent in conducting a retrial after significant delay. *Brecht*, 507 U.S. at 637 (quoting *United States v. Mechanik*, 475 U.S. 66, 72 (1986)).

After stating these concerns, the *Brecht* majority explained that "[s]tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error." 507 U.S. at 636 (citing *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (*per curiam*)). On this basis, this Court concluded that "it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review." *Id.*[17] Accordingly, this Court held that "the *Kotteakos* harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type." *Id.*

Concurring, and supplying the decisive vote in *Brecht*, Justice Stevens emphasized that the *Kotteakos* standard is quite exacting and that the government bears the burden of persuasion under that standard. *Id.* at 641. Moreover, Justice Stevens explained that the manner in which the standard is phrased "is far less important than the quality of the judgment with which it is applied." *Id.* at 643.

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[17] *See California v. Roy*, 519 U.S. 2, 5 (1996) (*per curiam*) (applying the *Brecht-Kotteakos* standard on collateral review, and in doing so, stressing that the state courts had performed *Chapman* harmless-error analysis).

### B. The Rationale Underlying This Court's Decision to Apply the *Kotteakos* Standard in *Brecht* Is Inapplicable Where No Court Has Previously Applied the *Chapman* Standard in Evaluating Whether Constitutional Error Is Harmless.

As discussed above, *Chapman* requires a new trial where the State cannot prove beyond a reasonable doubt that a guilty verdict was "surely unattributable" to constitutional error. *Sullivan v. Louisiana*, 508 U.S. at 279. This rigorous standard is necessary "to protect people from infractions by the States of federally guaranteed rights[,]" *Chapman*, 386 U.S. at 21, particularly in cases where "the question of guilt or innocence is a close one." *Id.* at 22. Thus, the *Chapman* standard is critical to "the reliability of the criminal process." *Brecht*, 507 U.S. at 650 (O'Connor, J., dissenting).

A criminal defendant should not be deprived of the right to have the prejudicial effect of a constitutional error assessed under the *Chapman* standard solely because a state appellate court failed to identify the constitutional defect in trial proceedings. The complete denial of exacting harmless-error review, however, is the consequence of a rule under which the *Brecht* standard is applied in federal habeas, even if, in antecedent state appellate proceedings, the state courts failed to identify the constitutional error, and thus failed to conduct *Chapman* harmless-error analysis.

Far from laying the consequences of such state-court error at the habeas petitioner's feet, this Court's holding in *Brecht* was actually quite limited. *See Orndorff v. Lockhart*, 998 F.2d 1426, 1430 (CA8 1992), *cert. denied sub nom. Norris v. Orndorff*, 511 U.S. 1060 (1994). The state

appellate courts in *Brecht* had reviewed the constitutional error in question under *Chapman*. *Brecht*, 507 U.S. at 626-627. That being the case, this Court stated that "state courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*," and that "it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review." *Brecht*, 507 U.S. at 636. Clearly then, *Brecht* is premised on the notion that when (and if) the state courts apply the *Chapman* harmless-error standard, the federal habeas courts need only review the same error under the *Kotteakos* harmless-error standard. *Id.*; *Orndorff*, 998 F.2d at 1430. It follows that where an otherwise "fully qualified" state court fails in its obligation to "identify constitutional error," and therefore deprives itself of any occasion to "evaluate [the] prejudicial effect [of the error] . . . under *Chapman*," *id.*, the "logic[]" recognized in *Brecht* dictates that the federal habeas court "engage in . . . the harmless-error review that *Chapman* requires state courts to engage in on direct appeal."

That a federal habeas court should apply *Chapman* rather than *Brecht* where the state court failed to recognize a constitutional error is compelled not only by the premise of *Brecht* itself, it is also preferable as a matter of policy and workability. To begin with, the comity concerns arising out of a federal court's repetition of "the identical approach" undertaken by a state court simply do not exist where the state court should have applied, but failed to apply, *Chapman*. Furthermore, insistence upon the application of *Brecht* regardless of any omissions by the state court would serve only to compound the state court's error,

further undermining the values recognized in *Chapman*. *See Barber v. Johnson*, 145 F.3d 234, 237-238 (CA5) (Dennis, J., concurring) (quoting *Chapman*, 386 U.S. at 21), *cert. denied*, 525 U.S. 1005 (1998) (where a federal court "repeat[s] [a] state court's error" by failing to review a constitutional error under the *Chapman* standard, the federal court "will have failed in its obligation to 'protect people from infractions by the States of federally guaranteed rights'").[18] Indeed, as one court cogently observed,

> *Brecht*'s rule cannot be that a federal court must blindly apply *Kotteakos*, rather than *Chapman*, as soon as it receives a § 2254 petition, utterly without regard to the . . . [state court's treatment of the issue.] If that were *Brecht*'s rule, a federal court would have to apply *Kotteakos* simply because it was technically conducting collateral review of a criminal conviction, even if a state were to eliminate all direct appeals of criminal convictions – as it is likely that it constitutionally could do . . .

*Lyons v. Johnson*, 912 F. Supp. 679, 689 n. 9 (S.D.N.Y. 1996); *see also id.* at 689 ("federal courts should, under *Brecht*, respectfully defer to state courts' analyses of the harmlessness of constitutional error – but where no prior state court *Chapman* holding exists, there is nothing to which to defer"); 2 R. Hertz & J. Liebman, *Federal Habeas*

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[18] *See Reed v. Ross*, 468 U.S. 1, 10 (1984) ("There can be no doubt that in enacting § 2254, Congress sought to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action.") (internal quotation marks omitted).

*Corpus Practice and Procedure* § 31.1, p. 1507, n. 19 (5th ed. 2005).[19]

The irrationality of applying *Brecht* in federal habeas in the absence of an antecedent state court finding of harmlessness under *Chapman* is further underscored when the requirements of § 2254(d) are added to the mix. For example, if, after recognizing the existence of a constitutional error, a state court were to apply its own brand of harmless-error analysis, and if that analysis bore a closer resemblance to *Brecht* than to *Chapman*, a federal habeas court would have no difficulty concluding that the state court's decision was "contrary to" *Chapman* under § 2254(d)(1). At that point, the very deviation from the holding of *Chapman* that satisfied § 2254(d)(1)'s "contrary to" clause would logically compel the federal court to act correctly where the state court acted incorrectly – that is, to give the prisoner the benefit of a harmlessness review under the *Chapman* standard. *See* A. Hirsch, *Harmless-Error Analysis in Habeas Corpus Cases: Should Brecht Still Apply?* 25 Champion 28, 30 (2001). To instead permit (or require) the federal court to apply the same standard it rightly faulted the state court for applying would render both the § 2254(d)(1) inquiry and the mandate of *Chapman* meaningless technicalities.

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[19] As the Sixth Circuit recently explained in a related context: "[W]e owe a different type of deference to state proceedings when a state court has found an error to be harmless than when it found no error. . . . [¶] . . . When a state court explicitly has held that an error was harmless, we owe deference to that conclusion of law as a matter of comity. When a state court does not reach the question of harmless error, we owe no such deference, since there is no relevant conclusion of law to which we could defer." *Eddleman v. McKee*, ___ F.3d ___, 2006 U.S. App. LEXIS 30629, *21-22 (CA6 2006).

### C. Rigorous Harmless-Error Review Is Necessary to Protect Defendants from Erroneous Convictions.

"Getting harmless-error determinations right . . . is central to accurate determinations of guilt. . . . " J. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error In Criminal Trials*, 99 Nw. U.L. Rev. 1053, 1055 (2005).

This Court has repeatedly stressed the intuitive notion that when the likelihood of an erroneous conviction of an innocent person has been established, a meaningful opportunity to correct the error must be made available. In such cases, the concerns identified in *Brecht*, which typically justify limitations on the available scope of post-conviction relief, must yield. *House v. Bell*, 126 S.Ct. 2064, 2076 (2006) ("'the principles of comity and finality . . . "must yield to the imperative of correcting a fundamentally unjust incarceration[.]"'") (quoting *Murray v. Carrier*, 477 U.S. 478, 495 (1986) (quoting in turn *Engle v. Isaac*, 456 U.S. at 135); *accord*, *Withrow v. Williams*, 507 U.S. 680, 718 (1993) (Scalia, J., dissenting) (referring to the "possibility that the assigned error produced the conviction of an innocent person" as the "most significant" factor weighing in favor of a federal court's exercise of discretion to entertain a habeas claim); *Teague v. Lane*, 489 U.S. 288, 313 (1989) (plurality opinion) ("our cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review"); *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986) (plurality opinion) ("[A] prisoner retains a powerful and legitimate interest in obtaining his

release from custody if he is innocent of the charge for which he was incarcerated.").[20]

The unconstitutional exclusion of Ms. Maples' reliable and unbiased testimony regarding her cousin's confession may well have led to the conviction of an innocent man. To guard against this ultimate miscarriage of justice, this grave constitutional error must be reviewed by some court, at some stage, under the exacting *Chapman* standard. Only if it can be determined beyond a reasonable doubt that the error did not have any bearing on the jury's decision to convict can the error be treated as harmless. *Chapman*, 386 U.S. at 24. Thus, application of the *Chapman* harmless-error standard in a case such as this comports with the "fundamental value determination of our society" to prevent condemnation of the innocent. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

## II. THE ERROR WAS PREJUDICIAL UNDER THE *BRECHT-KOTTEAKOS* STANDARD.

Even if *Brecht* is the appropriate harmless-error standard, the exclusion of Ms. Maples' reliable testimony had a substantial and injurious effect on the jury's verdict. As noted previously, the first two trials ended when the respective juries could not reach a verdict. J.A. 121. This was not a fluke, as there was substantial probative evidence of

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[20] *See also* R. Berkowitz, *Error-Centricity, Habeas Corpus and The Rule of Law as The Law of Rulings*, 64 La. L. Rev. 477, 498-502 (2004); J. Steiker, *Innocence and Federal Habeas*, 41 U.C.L.A. L. Rev. 303, 363 (1993); J. Jeffries & W. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. Chi. L. Rev. 679 (1990); H. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970).

Mr. Fry's innocence. The jury in the third trial deliberated for five weeks and only reached a verdict after a) having at one point declared itself deadlocked 7-5,[21] b) asking for clarification concerning the reasonable doubt standard, c) requesting numerous read-backs of testimony, and d) changing forepersons. J.A. 121, 167.

The sheer closeness of the case, underscored by the prior hung juries and the lengthy and difficult deliberations, militates against a finding of harmlessness regardless of the prejudice standard. *See, e.g., Kennedy v. Lockyer*, 379 F.3d 1041, 1056 n. 18 (CA9 2004) (prior hung jury and lengthy deliberations), *cert. denied*, 544 U.S. 992 (2005); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (CA9 2001) (lengthy deliberations); *United States v. Varoudakis*, 233 F.3d 113, 126 (CA1 2000) (lengthy deliberations and indication of impasse during deliberations).[22]

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[21] The jurors did not indicate whether they were split 7-5 in favor of conviction or acquittal. However, they did indicate they had taken numerous ballots before declaring themselves deadlocked. By that point, only two of the jurors were of the opinion they were not hopelessly deadlocked. J.A. 121.

[22] *See also United States v. Beckman*, 222 F.3d 512, 526 (CA8 2000) (prior hung jury); *United States v. Santana*, 175 F.3d 57, 67 (CA1 1999) (prior hung jury); *United States v. Paguio*, 114 F.3d 928, 935 (CA9 1997) (prior hung jury); *United States v. Ottersburg*, 76 F.3d 137, 140 (CA7 1996) (lengthy deliberations); *United States v. Doe*, 903 F.2d 16, 28 (CADC 1990) (prior hung jury); *United States v. Schuler*, 813 F.2d 978, 982 (CA9 1987) (prior hung jury); *Dallago v. United States*, 427 F.2d 546, 559 (CADC 1969) (lengthy deliberations).

In *Kennedy v. Lockyer*, 379 F.3d 1041, the court stated: "From the fact that the first trial ended in a mistrial [8-4 in favor of conviction], as well as the fact that the jury deliberated for a considerable amount of time in the second trial [3 days of deliberation after 1 day of evidence], we infer that the question as to . . . guilt or innocence was a close one in both trials." *Id.* at 1056 n. 18. In *United States v. Varoudakis*, 233 F.3d 113, the court stated: "[T]he three-day length of the jury deliberations,

(Continued on following page)

These same facts are particularly pertinent in assessing prejudice under *Brecht* given this Court's admonition in *Kotteakos* that "[t]he crucial thing is the impact of the thing done wrong on the minds of other[s] . . . , not on one's own in the total setting." 328 U.S. at 764. In other words, "one must judge others' reactions not by his own, but with allowance for how others might react. . . . " *Id.* Thus, the prejudice inquiry in this case must involve an assessment of the impact Ms. Maples' testimony would have had on the third jury – a jury that unquestionably had extraordinary difficulty in reaching its verdict. Because the record unequivocally establishes that the third jury struggled for weeks with the evidence presented, the court of appeals erred in concluding that Ms. Maples' unbiased, reliable testimony would not have influenced the jury's verdict.

Additionally, notwithstanding the exclusion of Ms. Maples' testimony, the jury heard evidence that someone other than Mr. Fry committed the double murder in question. The truck driver who witnessed the killings, and who did not know anyone involved in the case, testified that Mr. Fry was not the killer. J.A. 167-168. Seven other witnesses testified that Anthony Hurtz had made confessions and other incriminating statements "specifically link[ing]" him to the killings. J.A. 179.[23] Although the prosecution also presented evidence implicating Mr. Fry,

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and the jury's note to the trial court that it was 'at an impasse' at the end of the second half-day, weigh against a finding of harmless error." *Id.* at 126. The circumstances deemed to preclude findings of harmlessness in these cases pale in comparison to the relevant circumstances of the instant case.

[23] "The sheer number of independent confessions provide[s] additional corroboration for each." *Chambers v. Mississippi*, 410 U.S. at 300-301.

the defense not only countered much of that evidence, but presented a plausible alternative theory. Thus, this case differs markedly from *Brecht*, where "the State's evidence of guilt was, if not overwhelming, certainly weighty." 507 U.S. at 639.

Furthermore, the nature of the constitutional error in this case, a violation of Mr. Fry's Sixth and Fourteenth Amendment rights to present evidence relevant to his guilt or innocence, must be taken into account. *Kotteakos v. United States*, 328 U.S. at 765-766 (noting that "the nature of the error" in question "and 'its natural effect' for or against prejudice in the particular setting[]" bear on the ultimate inquiry). The exclusion of Ms. Maples' unbiased testimony inhibited the jury's ability to "decide where the truth lies." *Washington v. Texas*, 388 U.S. at 19; *accord*, *Holmes v. South Carolina*, 126 S.Ct. 1727, 1735 (2006) ("the petitioner proffered evidence that, if believed, squarely proved that [someone else], not petitioner, was the perpetrator."); *Crane v. Kentucky*, 476 U.S. 683, 690-691 (1986) (the exclusion of "competent, reliable evidence" that is "central to the defendant's claim of innocence . . . deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing") (citations and internal quotation marks omitted); *Chambers v. Mississippi*, 410 U.S. at 300-303 (exclusion of reliable evidence regarding alternate suspect's confessions renders a trial fundamentally unfair).

As Judge Rawlinson noted in her dissenting opinion, Ms. Maples "was the only unbiased witness" in this case who heard Mr. Hurtz confess to committing the crime for which Mr. Fry is now imprisoned. J.A. 214. Thus, the testimony Ms. Maples would have provided is the type of

testimony "generally recognized as having a powerful impact on jurors." J.A. 214 (citing *Skipper v. South Carolina*, 476 U.S. at 8).

By contrast, the Ninth Circuit panel majority concluded that although Ms. Maples' testimony "would have substantially bolstered Fry's claims of innocence[,]" J.A. 212 (internal quotation marks and brackets omitted), the unconstitutional exclusion of the evidence was harmless because "it did not have 'a substantial and injurious effect or influence in determining the jury's verdict.'" J.A. 212. This conclusion is paradoxical: To state that the exclusion of evidence would have "substantially bolstered" a claim of innocence is at odds with an assertion that the exclusion of the evidence "did not have a substantial and injurious effect" on the jury's verdict. Such an insoluble explanation does not reflect the importance of the "quality of . . . judgment" in conducting harmless-error review to which Justice Stevens referred in his concurrence in *Brecht*. 507 U.S. at 643 ("the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied").

Perhaps the panel majority's inexplicable determination that the error was harmless stemmed from an implicit misallocation of the risk of non-persuasion under *Brecht*. The district court had improperly allocated the burden of persuasion (or risk of non-persuasion) to Mr. Fry,[24] and

[24] The district court characterized this as a "difficult case" and stated that Mr. Fry had "come[ ] close to demonstrating actionable error[,]" J.A. 114, 205, but that ultimately "there ha[d] been an insufficient showing that the improper exclusion of [the] testimony of Ms. Maples had a substantial and injurious effect on the jury's verdict." J.A. 181-182. This language reveals the district court was looking to Mr. Fry to "demonstrat[e]" or "show[ ]" prejudice. The court was not looking to

(Continued on following page)

although Mr. Fry raised this burden-shifting issue in the Ninth Circuit, AOB at 58-59, the panel majority did not address the issue. The district court's allocation of the burden of persuasion to Mr. Fry contravened this Court's holding in *O'Neal v. McAninch*, 513 U.S. 432.[25] The Ninth Circuit panel majority's finding of harmlessness can be viewed as slightly less inexplicable if it too was based upon a misallocation of the burden of persuasion.

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the State to make such a showing, and the court did not saddle the State with "the risk of non-persuasion." *O'Neal v. McAninch*, 513 U.S. at 447 (Thomas, J., dissenting).

[25] In *O'Neal* this Court directly addressed the issue of the proper allocation of the burden of persuasion with respect to prejudice in habeas cases. Noting that traditional burdens of proof are inapposite in the context of harmless-error review, where a judge is called upon to apply "a legal standard (harmlessness) to a record" that has already been developed, 513 U.S. at 436, this Court recast the burden issue as, instead, a question as to which party prevails when "the matter is so evenly balanced that [the judge] feels himself in virtual equipoise as to the harmlessness of the error." *Id.* at 435. Although this Court observed that cases involving such a state of equipoise, i.e., "'grave doubt,'" are "unusual[,]" *id.*, *see also id.* at 452 (Thomas, J., dissenting) (such a state of equipoise is present in "only a minuscule fraction of cases"), this Court held that the petitioner prevails in these cases. *Id.* at 435. Effectively, then, the State bears the risk of non-persuasion.

More recently, in *United States v. Dominguez Benitez*, 542 U.S. 74, this Court stated that when a constitutional error comes up on collateral review, "the Government has the burden of showing that [the] . . . error is harmless. . . ." *Id.* at 81 n. 7; *accord*, *Darden v. Wainwright*, 477 U.S. 168, 197 (1986) (Blackmun, J., dissenting) (noting that under "[e]very harmless error standard . . . this Court has employed . . . , once serious error has been identified, the burden shifts to the beneficiary of the error to show that the conviction was not tainted"); *Lainfiesta v. Artuz*, 253 F.3d 151, 158 (CA2 2001) (noting that in harmless-error review under *Brecht* "[t]he burden of persuasion is on the government"), *cert. denied sub nom. Lainfiesta v. Greiner*, 535 U.S. 1019 (2002); 3B C. Wright, N. King & S. Klein, *Federal Practice and Procedure: Criminal 3d*, § 854, p. 465 (2004) ("harmless error requires the prosecutor to disprove prejudice").

In any event, regardless of the harmless-error standard that governs in this case, and regardless of the allocation of the risk of non-persuasion under that standard, there is no basis in law or fact for characterizing the error in this case as harmless, as it struck directly at the guilt/innocence determination in this case: If Ms. Maples' proffered testimony is true, Mr. Fry is innocent of the murder for which he has now been imprisoned for nearly 15 years, and the actual killer has gotten away with murder. Even under *Brecht*, such error cannot be deemed to have had an insubstantial effect on the jury's verdict.

## CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

January 18, 2007

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# APPENDIX A

## § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel

under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

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(5)

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# In The Supreme Court of the United States

JOHN F. FRY,

*Petitioner,*

v.

CHERYL K. PLILER, Warden,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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## QUESTION PRESENTED

Is application of the harmless-error standard for federal habeas corpus cases enunciated in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), limited to cases where the state court recognized federal constitutional error and subjected it to review for harmlessness under *Chapman* v. *California*, 386 U.S. 18 (1967)?

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## STATEMENT OF THE CASE

### A. The State Trial

After two California juries had deadlocked, a third jury in 1995 convicted petitioner Fry of the first-degree murders of Cynthia and James Bell at a trial in which a citizen fortuitously came forward with petitioner's gun, and scientific evidence showed it to be the murder weapon. J.A. 44, 67-68.

#### 1. Prosecution Case

a. In the third trial, the prosecution produced evidence that, shortly before 7 a.m. on October 27, 1992, the Bells were discovered shot dead inside a Chevrolet Camaro automobile parked alongside Interstate 505 in Solano County, California. Reporter's Transcript ("R.") 578-83. The time of death was six to twelve hours earlier. R. 1499, 1518, 1526. Witnesses reported a truck similar to petitioner's parked next to the Camaro the previous evening. R. 846, 855, 872, 1223.

Petitioner, a methamphetamine user and dealer, had employed Cynthia Bell as one of his dealers. Less than a week before, petitioner caught Cynthia in his house without permission and became convinced she planned to steal drugs or money from him. R. 1367-68, 1947-52. Several witnesses testified petitioner threatened to kill Cynthia in the days before her death. R. 1256, 1381, 1955.

Petitioner also was behaving erratically. On October 24, he drove Arleen Murphy to a deserted levee road where he accused her of plotting to steal from him. R. 1202-03. He said it was time for Murphy to "go to sleep," and he fired his .357 out the truck window. R. 1203-06. On the

morning of the murders, petitioner kicked in the door of Murphy's boyfriend's apartment. R. 1234-36.

After the murders, petitioner returned home in a bloody, disheveled state. He told his brother, his friend and a roommate that he had killed the Bells. R. 1682-83, 1965-66, 2101. Petitioner's .357 revolver held four spent shells and had blood on it. R. 1690, 1693, 2112, 2118. Petitioner said "you couldn't imagine" what a .357 would do to "somebody's skull." R. 2120. Petitioner cleaned up, then left to make a drug transaction.

Later, petitioner told his brother that he had ditched the gun at a nearby gas station, and that a man named "Mike" picked up the gun for him. R. 2287. The day after the murders, petitioner removed the camper shell from his truck to alter its appearance. R. 1698-99. When police attempted to arrest him, petitioner fled, leading them on a high-speed pursuit. R. 2327, 2334-35.

b. Petitioner had registered a Ruger Security Six .357 magnum pistol in May 1991. R. 2315. An empty "Ruger pistol box" was found in petitioner's house, but at first the gun itself was not located. R. 1561-63. According to a firearms expert, bullets recovered from the bodies and the crime scene could have been fired from a Ruger .38 Special or .357. R. 2366, 2370.

After the prosecution rested its case, Robert Gridley, a citizen who had learned from press accounts of the trial that the murder weapon was missing, came forward with petitioner's .357. R. 2402-03. After the prosecution reopened its case-in-chief, Gridley testified that in May 1993 he had found the gun hidden in the metal channel of a doorframe in unit 5141-C of an industrial building in Vacaville, California. R. 2431-33.

Michael Walker, who worked for the same transportation company as petitioner, had rented unit 5141-C from summer until about Christmas in 1992. R. 2476-78, 2483. Walker sublet to Mike Turner, who agreed to pay half the rent and had a key to the unit. R. 2480. About a month before the murders, petitioner and his girlfriend had visited unit 5141-C. R. 2483. Two days after the murders, police serving a search warrant at petitioner's house observed Mike Turner across the street. R. 2464-65.

The gun found by Gridley was unloaded and in a case, but the speed loader with the gun contained two .38-caliber bullets and four .357-caliber bullets. R. 2438. Petitioner's brother Edgar identified the gun found by Gridley as the firearm from which Edgar had cleaned blood on the night of the murders. R. 2470-71. Edgar testified that the gun case found by Gridley was similar in size and shape to petitioner's gun case. R. 2470.

The .357 revolver, moreover, bore the serial number of a gun registered by petitioner in 1991. R. 2456. A ballistics expert testified that one bullet found at the crime scene had been fired by that gun. R. 2461. At least two other bullets recovered from the scene could have been fired by petitioner's gun, but there was insufficient individual detail on those bullets for a definite match. R. 2462.

c. In addition, the prosecution produced evidence from five witnesses that petitioner had admitted killing the Bells. On the night of the crime, petitioner confessed the murders to his brother Edgar, R. 2101, 2120; to his friend Debbie Mathies, R. 1965-66; and to his housemate Shannon Nissen, R. 1688-89, 1695. The next morning, while petitioner and Nissen removed the camper shell so people would not "recognize the truck," petitioner told

Nissen that he had shot Cynthia Bell "and her boyfriend." R. 1699-1700. A day or two before his arrest for the murders, petitioner told a former co-worker, Douglas Carter, that he had "killed the people in Vacaville" because they had been "harassing him and his kids." R. 2500.

The fifth person to whom petitioner admitted the killings was Robert Jacobitz. They met while petitioner was in custody awaiting the third trial and Jacobitz was incarcerated on domestic violence charges. Jacobitz claimed membership in the Aryan Brotherhood prison gang to bring himself respect from other inmates. R. 955. Petitioner told Jacobitz that he had caught Cynthia Bell breaking into his house and that she owed him money, and that he therefore had arranged to meet her and James Bell in a secluded area in Vacaville and kill them. R. 974. Petitioner told Jacobitz he kissed Cynthia on the cheek, said something to her, and then shot her in the head. R. 979-80. Petitioner reported that it "blew her head off," and that a piece of her skull was found 35 feet away. R. 981. He said that he then reached across her, saying "I'm sorry James. You're in the wrong place at the wrong time," and shot James three times. R. 980-81. Petitioner said that he used a .357 caliber gun to do the killings, and that he had blood on his shirt, pants and shoes. R. 980, 983. Petitioner also said that his girlfriend's "best friend," a "black male," now had the murder weapon. R. 988.[1]

Petitioner further told Jacobitz that his brother was the "star witness in the case against him." R. 964. Petitioner explained that he really needed his brother to

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[1] Mike Turner meets this description. R. 2734, People's Exhibits 110, 111.

change his testimony "to offset the other witnesses." R. 966. He warned that his brother could not be killed, as the prosecution could simply use his testimony from the prior trials. Jacobitz told petitioner that people could call on his brother and take steps like cutting off his finger to "let him know they're serious" about changing his story. R. 970. Petitioner later supplied Jacobitz with a piece of paper with his brother's name and address. R. 994-95, Exhibit 102.[2]

**2. Defense Case**

In his defense, petitioner testified that he was at home when the Bells were killed. The defense identified three men who had threatened the Bells or had confessed to the murders: Darryl Borelli, Ryan Bernal, and Anthony Hurtz. Two witnesses said that Borelli was a drug dealer and that he was angry with and threatening towards Cynthia Bell. R. 4302-03, 4420. Two witnesses said that Bernal had admitted participating in the killings. R. 4122, 4822-24. Seven witnesses said that Hurtz had confessed to committing the murders, or had admitted to being involved in planning their murders. R. 3999, 4069, 4156-58, 4247-49, 4439-40, 4484-85, 4755-60.

The defense offered an eighth witness, Hurtz's cousin Pamela Maples. She testified that, in April 1994, she was at her sister's condominium in Vallejo when she overheard Hurtz discussing some homicides. J.A. 7-8. After the prosecutor objected on lack-of-foundation grounds, J.A. 8, the judge heard Maples testify further outside the

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[2] Petitioner admitted writing his brother's address on a sheet of paper and giving it to Jacobitz, but denied asking Jacobitz to do anything to his brother. R. 3743-44.

presence of the jury. Maples continued, stating that she had been "in and out" of the room and heard "bits and pieces" of a conversation that was already underway when she came in. J.A. 9-10. She did not know how long the others had been discussing the murders, the context of the discussion, or if it was even a serious discussion. J.A. 10-11. According to Maples, Hurtz said that he had shot a man and a woman in a car: that he shot the "girl" first, in the head, and "[t]hen he reached over and shot the guy." J.A. 12. In Maples's account, Hurtz said that this had occurred in a "parking place," that he was "full of blood" after the killings, and that he ran through a field and threw mud on himself and then called someone to pick him up. J.A. 12. Hurtz said nothing about when or where this took place. J.A. 13.

The trial court sustained the prosecution's objection to Maples's testimony, finding that "there's not been a sufficient showing that this testimony ties in with the facts of our case." J.A. 17.

### B. The State Appeal

The California Court of Appeal affirmed the judgment. J.A. 25. The court rejected petitioner's claim that the exclusion of Maples's testimony had denied him his rights to present a defense and to a fair trial. J.A. 94. Applying California Evidence Code § 352, it found that, "[e]ven if her testimony was fully credited, there was simply insufficient evidence to connect the murders she heard Hurtz describe, with the ones at issue here." J.A. 96-97. The court reasoned that Maples "did not know when or where the killings occurred, or even if Hurtz was seriously describing an act he had himself committed. There was no mention of Cynthia or James Bell, and indeed no

identification of the alleged victims' [sic] of Hurtz's murders at all." J.A. 97. Without specifying a standard of review, the state appellate court also found "no possible prejudice" from the exclusion of Maples's testimony, because "very similar testimony" reporting Hurtz's confessions by at least two other defense witnesses, Harmina Ross and Eliane West, made Maples's "testimony to similar effect . . . merely cumulative." J.A. 97 n.17.[3]

The California Supreme Court denied review. J.A. 113.

## C. Federal Proceedings

1. In 2001, petitioner filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Eastern District of California. The district court adopted the magistrate judge's findings and recommendation to deny the petition. J.A. 209. The court ruled, first, that Maples's proffered testimony was "sufficiently 'crucial or reliable' to outweigh the state's interest in exclusion of untrustworthy evidence." J.A. 180. And, acknowledging the applicability of the Antiterrorism

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[3] Although the court did not specify a standard of review, California law applies the test of *People* v. *Watson*, 46 Cal. 2d 818, 836, 299 P.2d 243 (1956), where a defendant must show a reasonable probability of a more favorable result in the absence of the error, to exclusion of third party culpability evidence under California Evidence Code § 352. *People* v. *Cudjo*, 6 Cal. 4th 585, 611-12, 863 P.2d 635, 650-51, 25 Cal. Rptr.2d 390, 405-06 (1993). Petitioner conceded as much in his appellate brief in the state court of appeal. Appellant's Opening Brief at 106. Because the state court appeared to be resolving the issue on § 352 grounds, and in view of petitioner's concession that *Watson* was the controlling standard, respondent did not contend in the Ninth Circuit that the state court finding of "no possible prejudice" was an analysis pursuant to *Chapman*. Appellee's Brief at 24. Under circumstances other than those presented here, however, a finding of "no possible prejudice" in a state court may well indicate an application of *Chapman* review.

and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104(3), 110 Stat. 1214, 1219 (AEDPA) to the case, J.A. 117, the court further determined under 28 U.S.C. § 2254(d) that the state appellate court's failure "to recognize the trial court's error was an unreasonable application of clearly established law as set forth by the Supreme Court," J.A. 180 (citing *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), and *Washington* v. *Texas*, 388 U.S. 14 (1967)).

But the district court concluded that the state court's error was harmless under *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993):

> Respondent is correct that petitioner presented a number of defense witnesses attesting to Hurtz's and Borelli's culpability. The same corroborative value attributable to Maples' testimony that is a part of the constitutional error analysis in petitioner's favor, nevertheless cuts against petitioner when determining whether the exclusion of Maples' testimony was harmful. The defense witnesses' implicating Hurtz, who were heard by the jury, were more exact and precise in their testimony and alleged far more damning detail, notwithstanding any bias and/or impeachment the prosecution was able to show. Thus, the jury did hear a good bit of evidence regarding Hurtz' alleged involvement. Moreover, respondent is correct that she could not have emerged completely unscathed by a cross-examination that would have pointed up the infirmities of her putative testimony, as noted above. While this court cannot conclude, as did the state appellate court that "no possible prejudice" could have ensued as result of the exclusion of the testimony, the court does find that there has been an insufficient showing that

> the improper exclusion of the testimony of Ms. Maples had a substantial and injurious effect on the jury's verdict. Habeas relief should be denied for this claim.

J.A. 181-82.

2. On appeal, the Court of Appeals for the Ninth Circuit affirmed in an unpublished opinion. It deemed the exclusion of Maples's testimony an "unreasonable" application of Supreme Court law, finding the evidence "sufficiently reliable" and "material." J.A. 212. The appellate court concluded, however, that "the exclusion of Maples' testimony was harmless because it did not have a 'substantial and injurious effect or influence in determining the jury's verdict.'" J.A. 212 (citing *Brecht* v. *Abrahamson*, 507 U.S. at 637).

The panel rejected petitioner's contention that *Brecht* should not apply when "the state appellate court failed to conduct a meaningful prejudice review." Invoking the Ninth Circuit precedents of *Bains* v. *Cambra*, 204 F.3d 964, 976 (9th Cir. 2000), and *Inthavong* v. *LaMarque*, 420 F.3d 1055, 1059 (9th Cir. 2005), the panel held that "the *Brecht* standard applies uniformly in all Federal habeas corpus cases under § 2254, regardless of the error standard, if any, applied by the state court." J.A. 212-13 n.3.

Judge Rawlinson dissented, but also applied *Brecht*. J.A. 213. She characterized Maples as "the only unbiased witness presented by either side" and opined that Maples's testimony would have had "a powerful impact" on the jurors. J.A. 213-14.

## SUMMARY OF ARGUMENT

As this Court has recognized, the *Brecht* v. *Abrahamson* harmless error standard reflects appropriate deference to the important state interests implicated in habeas corpus review of final state judgments. It therefore applies in every habeas case raising a harmless error question, regardless of whether the state court first undertook a harmless error inquiry. Imposition of any more exacting standard, such as that of *Chapman* v. *California*, is unwarranted and would upset the state-federal habeas balance recognized by this Court in *Brecht* and confirmed by Congress in AEDPA. Proper application of the *Brecht* rule in this case vindicates the conclusion of almost every judge who has considered the question: the claimed error was harmless.

1. This Court has long declared that habeas corpus review of state criminal convictions is not a mere extension of direct review. It does not serve as a second appeal. Habeas review is separate and collateral, both in form and function. Relief is not available merely upon an ordinary showing of error and prejudice. These limits on habeas corpus are founded in important policy judgments about federalism, comity, finality of criminal convictions, and the primacy of the trial as a truthfinding mechanism.

Those same judgments led this Court to declare, in *Brecht*, that final criminal convictions would not be overturned on federal habeas corpus simply because the state could not show that a constitutional violation was harmless "beyond a reasonable doubt" under the appellate standard of *Chapman*. A more-forgiving standard—whether the error actually exerted a substantial and injurious effect

on the verdict—was adopted as appropriate to collateral review.

The stated rationale of *Brecht* makes it clear that adoption of a forgiving standard, rather than the exacting *Chapman* standard, is a function of federal-state relations and the nature of habeas corpus—and that it does not logically depend upon the happenstance of whether the state court conducted any harmless-error inquiry first. The reasons cited in *Brecht*—finality of state convictions, concerns about comity and federalism, and a desire to accord trials proper respect—have nothing to do with a state court's prior ruling or application of *Chapman*. Petitioner's argument—that use of a relaxed harmless-error standard now should be relegated to the odd case where a state court previously subjected a claimed error to scrutiny under the strict rule of *Chapman*—ignores the important policies that this Court recognized in *Brecht*.

Besides being contrary to the policies enunciated in *Brecht*, it would be counterproductive to accept petitioner's attempt to hinge the federal courts' use of *Chapman*'s stringent standard for harmless-error review upon the state court's articulation of its prejudice analysis. Petitioner's reading likely would give rise to a host of interpretive issues about the standard of harmless-error review employed by the state court to particular issues, as well as to claims by habeas applicants that the state court had engaged in bad-faith applications of *Chapman* merely to avoid a stricter standard of federal habeas review.

Petitioner's argument would unacceptably alter the balance between the state and federal courts and between direct and collateral review. The *Brecht* standard should

be applied to *all* constitutional trial errors brought to federal court on collateral habeas review.

2. The Ninth Circuit and the district court correctly determined that the exclusion of Maples's testimony was harmless under the *Brecht* standard. The case against petitioner was strong, with multiple witnesses testifying to his bloody state following the murders and his immediate, graphic confessions to them. The production of petitioner's gun at the third trial, together with ballistics evidence establishing that the gun was the murder weapon, added a vital element of proof of petitioner's guilt that had been unavailable to the jurors at his earlier trials.

It is unlikely that exclusion of Maples's proffered testimony affected the result. In her out-of-court testimony, Maples never asserted that Hurtz had confessed to killing the Bells. The homicides he mentioned were not linked by time, location, or the victims' identities to the Bell murders at issue here. Moreover, Maples could not say with certainty that Hurtz was "serious" when he spoke. Maples's inability to recount more than pieces of the conversation she overheard, let alone to testify that Hurtz actually confessed to these killings, diminished dramatically the value of her testimony.

To the extent the defense sought to prove that Hurtz had inculpated himself in the Bell killings, it had the benefit of seven witnesses who testified to that effect. Even so, petitioner's defense never focused, as petitioner suggests here, on a theory that Hurtz was the "actual killer" of the Bells. Rather, petitioner presented a third-party culpability defense offering three potential killers, not one. Petitioner's shotgun-style defense blunted the effectiveness of all the third-party culpability evidence,

and reduced further any relevance of Maples's testimony about Hurtz.

## ARGUMENT

### I.

### THE *BRECHT* STANDARD APPLIES IN DETERMINING HARMLESS ERROR IN 28 U.S.C. § 2254 CASES

In *Brecht* v. *Abrahamson*, 507 U.S. 619, 638 (1993), this Court held that federal habeas corpus relief is unavailable for constitutional error of the trial type unless the error had a substantial and injurious effect or influence in determining the jury's verdict. The Court thereby adopted for habeas cases the more forgiving standard for nonconstitutional errors of *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946); and it limited to direct appeals the stricter standard of *Chapman* v. *California*, 386 U.S. 18, 24 (1967), which requires the State to show beyond a reasonable doubt that the error did not contribute to the verdict.

The Court took pains in *Brecht* to explain the concerns of finality, comity, and federalism that justified its decision. 507 U.S. at 634-36. In particular, the Court observed that "[o]verturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters." *Id.* at 637.

Because the *Brecht* harmless-error standard reflects appropriate deference to the important state interests

implicated in habeas corpus review of final state judgments, it properly may be applied in every habeas case requiring a harmless-error analysis. Its application does not depend on whether the state court first undertook a harmless-error inquiry. Imposition of any more exacting standard, such as that of *Chapman*, is unnecessary and would upset the state-federal habeas balance recognized by this Court in *Brecht* and confirmed by Congress in AEDPA.

### A. The *Brecht* Harmless-Error Standard Is Well-Established As A Basic Rule Of Habeas Corpus

Following *Brecht*, this Court has repeatedly held that "the more lenient *Kotteakos* harmless-error standard, rather than the stricter *Chapman* standard, normally governs cases of habeas review of constitutional trial errors. . . ." *O'Neal* v. *McAninch*, 513 U.S. 432, 438 (1995); see also *Calderon* v. *Coleman*, 525 U.S. 141, 147 (1998) (per curiam) (recognizing, in habeas proceedings, that constitutional errors must prejudice petitioner under *Brecht* standard before relief can be granted); *California* v. *Roy*, 519 U.S. 2, 4-5 (1996) (per curiam) ("[A] federal court reviewing a state-court determination in a habeas corpus proceeding ordinarily should apply the [*Brecht*] harmless error standard. . . ."); *Kyles* v. *Whitley*, 514 U.S. 419, 436 (1995) ("[W]e held in *Brecht* that the standard of harmlessness generally to be applied in habeas cases is the *Kotteakos* formulation. . . ."); *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81 n.7 (2004) (stating that "on collateral review, the heightened interest in finality generally calls for the Government to meet the more lenient *Kotteakos* standard."); *United States* v. *Vonn*,

535 U.S. 55, 63 (2002) (stating that *Brecht* is "the variant of harmless-error review applicable on collateral attack").

In accord with this Court's repeated pronouncements that the *Brecht* standard controls when a federal habeas court analyzes trial error for harmlessness, the vast majority of circuit courts to consider the issue have held that *Brecht* is to be applied in habeas cases, regardless of the standard of review applied to trial error by the state court. *Hassine* v. *Zimmerman*, 160 F.3d 941, 951 (3d Cir. 1998); *Sherman* v. *Smith*, 89 F.3d 1134, 1141 (4th Cir. 1996); *Hogue* v. *Johnson*, 131 F.3d 466, 499 (5th Cir. 1997); *Gilliam* v. *Mitchell*, 179 F.3d 990, 995 (6th Cir. 1999); *Tyson* v. *Trigg*, 50 F.3d 436, 446-47 (7th Cir. 1995); *Bains* v. *Cambra*, 204 F.3d at 977; *Castro* v. *Oklahoma*, 71 F.3d 1502, 1515-16 & n.14 (10th Cir. 1995); *Horsley* v. *Alabama*, 45 F.3d 1486, 1492 n.11 (11th Cir. 1995); contra, *Starr* v. *Lockhart*, 23 F.3d 1280, 1292 (8th Cir. 1994); see also *Benn* v. *Greiner*, 402 F.3d 100, 105 (2d Cir. 2005) (reserving issue).

### B. The Deferential *Brecht* Standard Is Well-Suited For Use On Collateral Review

The justification for applying a less stringent harmless-error standard in federal habeas proceedings than on direct appeal is rooted in the distinctly circumscribed and limited nature of federal habeas review. Collateral proceedings in the federal courts do not represent a continuation of direct review of criminal judgments. Federal habeas review is "secondary and limited." *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983). It "has historically been regarded as an extraordinary remedy . . . ." *Brecht*, 507 U.S. at 633. "Habeas corpus 'is designed to guard against extreme malfunctions in the

state criminal justice systems.'" *Id.* (quoting *Jackson* v. *Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring)). "'[A]n error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.'" *Brecht*, 507 U.S. at 634 (quoting *United States* v. *Frady*, 456 U.S. 152, 165 (1982)).

In keeping with both the limited nature of federal habeas review and the fact that the writ typically is sought to overturn a final judgment already obtained by competent authorities after a presumptively fair trial, this Court has "never defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error." *Kuhlmann* v. *Wilson*, 477 U.S. 436, 447 (1986). Rather, this Court has repeatedly emphasized the importance of deference to the States' "sovereignty over criminal matters" and to the finality of criminal judgments. *Brecht*, 507 U.S. at 637.

This concern is not limited to the issue of harmless error. It permeates this Court's jurisprudence regarding the scope and purpose of the writ. The plurality opinion in *Teague* v. *Lane*, 489 U.S. 288, 309 (1989), for example, restricted the ability of habeas petitioners to invoke new constitutional rules on collateral review, in part because the "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system."

Likewise, in *Wright* v. *West*, 505 U.S. 277 (1992), the Court stressed the "significant costs" of habeas review. *Id.* at 293 (quoting *Engle v. Isaac*, 456 U.S. 107, 126 (1982)). "Among other things, it disturbs the State's significant

interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Wright,* 505 U.S. at 293 (internal quotations omitted). The same considerations were articulated in *Stone* v. *Powell*, 428 U.S. 465 (1976), where the Court perceived that any benefit from reexamining Fourth Amendment claims of aggrieved prisoners via collateral review was "outweighed by the acknowledged costs to other values vital to a rational system of criminal justice." *Id.* at 494.

### C. *Brecht* Is Not Limited To Cases In Which The State Court Conducted *Chapman* Harmless-Error Review

Petitioner acknowledges that *Brecht* is a less stringent harmless-error standard on collateral review than *Chapman*. Petitioner's Brief on the Merits (PBM) 21. He contends, however, that *Brecht* is limited to cases where the state court recognized federal constitutional error and then "correctly applied" the *Chapman* harmless error test. PBM 17. He refers to the prior application of *Chapman* by the state court in *Brecht*, PBM 21, and to this Court's observations in that case that "state courts are fully qualified" to identify constitutional error and undertake harmless-error review under *Chapman* on direct review and that "it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review," PBM 25 (quoting *Brecht*, 507 U.S. at 636). Petitioner maintains that *Brecht* thus was "premised on the notion that state reviewing courts can be relied upon to identify federal constitutional error

under *Chapman*," so it ought not control where the state court did not apply *Chapman*. PBM 15.

1. Petitioner fundamentally misunderstands *Brecht*. The issue presented in *Brecht* was "whether the *Chapman* harmless-error standard applies in determining whether the prosecution's use for impeachment purposes of petitioner's post-*Miranda* silence, in violation of due process under *Doyle* v. *Ohio*, [426 U.S. 610 (1976)] entitles petitioner to habeas corpus relief." 507 U.S. at 622-23 (footnote and citation omitted). The answer given by the Court to that question was a straightforward no—not that the answer depended upon the state court having invoked the *Chapman* standard.

*Brecht* explained that "habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht*, 507 U.S. at 637 (quoting *United States* v. *Lane*, 474 U.S. 438, 449 (1986)). That *Brecht* answered globally the question of *Chapman*'s application on habeas review without regard to the resolution of the federal claim during the state court proceedings is apparent from *Brecht*'s textual holding: "[T]he *Kotteakos* harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type." *Id.* at 638. One reason expressed for the selection of the standard was that it was "better tailored to the nature and purpose of collateral review and more likely to promote the considerations underlying our recent habeas cases." *Id.* at 637-38. It would be inappropriate to read an exception into *Brecht* where none is stated, especially where the choice of the standard was linked to the purposes of collateral review.

The central theme of *Brecht*, moreover, is maintenance of the proper balance between a state's interest in the finality of its criminal convictions and the federal interest in validating a defendant's constitutional rights. This Court spoke of the "costs" of applying *Chapman* on collateral review and the "imbalance" created by applying such a high standard to final and presumptively correct convictions. *Brecht*, 507 U.S. at 636-37. It expressly recognized that States should not have final convictions overturned on federal habeas simply "because the State cannot prove that an error is harmless under *Chapman*." *Id.* at 637. That clearly demonstrates that this Court's focus was on the appropriate role of collateral review, not on the procedural history of the case, such as the harmless-error standard used below, or whether trial error had been identified on direct review.

*Brecht* identified four considerations justifying the application of a relaxed harmless error standard on collateral habeas review: (1) the States' interests in the finality of convictions, (2) comity, (3) federalism, and (4) the recognition that "liberal allowance of the writ degrades the prominence of the trial itself." *Id.* at 635 (quoting *Engle* v. *Isaac*, 456 U.S. at 127). All of these considerations are implicated in every habeas corpus case, not just in cases where the state court undertook a *Chapman* analysis. As this Court explained:

> Overturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters. Moreover, granting habeas relief merely because there is a reasonable possibility that trial error contributed

> to the verdict, is at odds with the historic meaning of habeas corpus—to afford relief to those whom society has grievously wronged. Retrying defendants whose convictions are set aside also imposes significant social costs, including the expenditure of additional time and resources for all the parties involved, the erosion of memory and dispersion of witnesses that accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of society's interest in the prompt administration of justice.

507 U.S. at 637 (citations and internal quotations omitted).

This comprehensive analysis led the Court to conclude that "[t]he imbalance of the costs and benefits of applying the *Chapman* harmless error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error." *Brecht*, 507 U.S. at 636-37. These justifications for the holding in *Brecht* are logically not dependent upon the state courts having applied *Chapman* to conduct harmless-error review.

2. More recently, this Court indicated that *Brecht* applies where, as here, the state court did not recognize or declare a federal constitutional error. In *Penry* v. *Johnson*, 532 U.S. 782 (2001), a habeas applicant convicted of capital murder in state court asserted that evidence was admitted at trial in violation of his Fifth Amendment privilege against self-incrimination. The state courts determined that no constitutional error occurred and conducted no analysis for harmlessness. *Id.* at 791. This Court also found no constitutional error. But it alternatively held:

> Even if our precedent were to establish squarely that the prosecution's use of the Peebles report violated Penry's Fifth Amendment privilege against self-incrimination, that error would justify overturning Penry's sentence only if Penry could establish that the error "had substantial and injurious effect or influence in determining the jury's verdict."

*Id.* at 795 (quoting *Brecht,* 507 U.S. at 637). Similarly, in *O'Neal* v. *McAninch*, 513 U.S. 432, the state court on direct review had found no error in the instructions given on conspiracy and conducted no harmless error review. *State* v. *O'Neal*, No. 44551, 1985 Ohio App. LEXIS 6819, 1985 WL 8571 (Ohio App. 8 Dist. July 25, 1985) (unreported). Yet this Court reaffirmed *Brecht* as the appropriate standard of harmless error on collateral review of the state judgment. *O'Neal*, at 435-36.

3. Petitioner also errs in contending that a criminal defendant should not be deprived of what he calls the "right" to have the prejudicial effect of a constitutional error assessed under the *Chapman* standard "solely because a state appellate court failed to identify the constitutional defect in trial proceedings." PBM 24. He suggests that applying *Brecht* on collateral review deprives a defendant in that circumstance of ever having *Chapman* review of his claim. Not so. A defendant is free to pursue direct review of his final state conviction to this Court by writ of certiorari. 28 U.S.C. § 1257(a). See *Stone* v. *Powell*, 428 U.S. 465, 495 n.38 (noting that a defendant is "free to file a timely petition for certiorari prior to seeking federal habeas corpus relief"). If this Court on such review were to find constitutional error of the trial type, the *Chapman* standard would then apply. *Chapman* itself was a case which came to the Court on direct, not

habeas, review. 386 U.S. at 20. If petitioner wanted to ensure *Chapman* review, he should have availed himself of his opportunity to file a petition for writ of certiorari following the denial of his petition for review by the California Supreme Court. But he did not do so.

Petitioner unpersuasively suggests that limiting *Brecht* to cases where *Chapman* review has already occurred in state court "is preferable as a matter of policy and workability." PBM 25. But petitioner's view of the policy question is trumped, as explained above, by this Court's contrary view in *Brecht*. And there is no reason to conclude that it would be more "workable" to create such differing approaches to federal habeas corpus review of state cases, depending on whether or not the state court conducted *Chapman* review. To the contrary, a rule establishing, once and for all, that *Chapman* is not the standard for harmless-error review on federal habeas corpus review would clearly promote consistency. See *O'Neal* v. *McAninch*, 513 U.S. at 443 ("In a highly technical area such as this one, consistency brings with it simplicity. . . .").

4. Petitioner's proposed rule, with its emphasis on examining whether the state "correctly applied" the *Chapman* standard (PBM 17), also is unwieldy. Because he links the choice of harmless-error standards on collateral review to this concept of "correctness" in state court, petitioner requires a federal court performing collateral review to parse the state court's analysis before it knows what standard to apply. And his rule may even require a court to research possible variations in a state's harmless error rule depending upon the type of proceeding, or the petitioner's failure to follow state procedural law, in an attempt to divine whether the state expressed sufficient

fidelity to *Chapman*.[4] Given the stakes, even a citation to *Chapman* itself might not forestall claims by habeas applicants of pretextual or inadequate applications of that standard by the state appeals court. Requiring the district courts to countenance such "correctness" claims in habeas cases would be an impractical and unseemly method of conducting collateral review. In effect, the federal district courts would be grading appellate opinions of the states before discovering which harmless-error standard to employ, an act at odds with AEDPA. See *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (AEDPA's "highly deferential" standard for evaluating state court rulings "demands that state-court decisions be given the benefit of the doubt.")

Adopting petitioner's rule would reintroduce the *Chapman* standard as the most common standard to be applied on collateral review, making *Brecht* a virtual nullity. Petitioner implies that a case like this one, where no *Chapman* review was performed in state court, is a rarity that must be accorded an exception to application of the *Brecht* rule. But the unusual case is, instead, the one where the state court has reached the error and applied *Chapman*. *Tyson* v. *Trigg*, 50 F.3d at 446 (a harmless error analysis in state court is a "fluke," as "ordinarily . . . the state court will not have found any error and therefore will have had no occasion to apply any standard of harmless

---

[4] In state habeas cases, states might well choose to apply their own harmless error standards, which might not be as exacting as *Chapman*, in the course of rejecting a petitioner's federal constitutional claims on collateral review. In view of the policies articulated in *Brecht*, which establish the utility of the *Kotteakos* standard in reviewing a final state judgment, it would naturally be appropriate to apply the *Brecht* standard to those claims on § 2254 review too.

error"); see also *Sherman* v. *Smith*, 89 F.3d at 1141 ("In many habeas cases, a state court will have rejected the petitioner's claim of error, and thus will have had no opportunity to apply harmless error analysis."). Consequently, any rule requiring *Chapman* to be used when the state courts fail to address harmless error would render *Brecht* inapplicable in the majority of habeas cases and "rob [*Brecht*] of any general significance." *Tyson*, 50 F.3d at 446.

5. Petitioner's suggestion that *Brecht* is limited to cases where *Chapman* has been previously applied in state court is further undercut by the use of *Brecht* on collateral review of federal decisions. At least five circuits have held that *Brecht* is the appropriate standard for harmless-error analysis in § 2255 cases, even where no *Chapman* review has been undertaken. See *Ellis* v. *United States*, 313 F.3d 636, 644 n.4 (1st Cir. 2002) (rejecting *Starr* v. *Lockhart*, 23 F.3d 1280 as "contrary both to circuit precedent and to the overwhelming weight of authority elsewhere"); *United States* v. *Dago*, 441 F.3d 1238, 1246 (10th Cir. 2006) ("[M]any of the concerns that motivated *Brecht* also are applicable in § 2255 cases."); *United States* v. *Montalvo*, 331 F.3d 1052, 1057-58 (9th Cir. 2003) ("*Brecht*'s harmless error standard applies to habeas cases under section 2255. . . ."); *Ross* v. *United States*, 289 F.3d 677, 682 (11th Cir. 2002) ("[A]pplication of the *Brecht* standard to *Richardson* error on collateral appeal is the appropriate approach."); *Murr* v. *United States*, 200 F.3d 895, 906 (6th Cir. 2000) ("[F]or purposes of federal habeas corpus review, a constitutional error that implicates trial procedures shall be considered harmless unless it had a 'substantial and injurious effect or influence in determining the jury's verdict'") (quoting *Brecht*, 507 U.S. at 637). The Second

Circuit has suggested the same conclusion, albeit in dicta. See *Santana-Madera* v. *United States*, 260 F.3d 133, 140 (2d Cir. 2001).

These views are consistent with this Court's analysis of harmless error in *Brecht*. Although *Brecht* was a § 2254 case, this Court has not limited that standard to cases arising from state courts. In *United States* v. *Vonn*, 535 U.S. at 63, the Court assumed that the *Brecht* standard applies in all collateral proceedings, including § 2255 proceedings. As the Ninth Circuit has explained, although principles of comity and federalism present when reviewing state convictions are not implicated by § 2255 proceedings, the concerns that motivate *Brecht* are applicable on *all* collateral review, including review of federal convictions:

> [*Brecht*] is, more than anything else, motivated by "considerations underlying our habeas jurisprudence," that apply equally to collateral attacks on both federal and state convictions—considerations such as the different purposes of direct and collateral review and the importance of finality in criminal convictions. Our reading of *Brecht* is fortified by the case's citation to *Teague*'s anti-retroactivity principle to illustrate the general practice of "appl[ying] different standards on habeas than [those] on direct review."

*United States* v. *Montalvo*, 331 F.3d at 1057-58 (citations omitted and brackets in original).

The fact that *Brecht* is applied by the circuit courts to federal convictions where no *Chapman* analysis has preceded it demonstrates the force of just one of the central themes in *Brecht*: that collateral review plays a

limited role in comparison to direct review. Given the additional federalism and state sovereignty issues implicated when final state convictions are reviewed, the argument against ever applying *Chapman* in § 2254 cases becomes even stronger. It would be anomalous for the federal courts to accord less protection to a final conviction from state courts than they accord to a federal conviction. See *Francis* v. *Henderson*, 425 U.S. 536, 541 (1976) (considerations of comity and federalism require that state convictions on review under § 2254 be treated as deferentially as federal convictions on review under § 2255).

### D. In Further Limiting And Not Expanding Habeas Review, AEDPA Supports A Forgiving Harmless-Error Rule

The policies that form the base for AEDPA support the use of a less demanding harmless-error standard like *Brecht*. Petitioner suggests that the provisions of AEDPA support the application of the *Chapman* standard on collateral review where there has been no state court *Chapman* analysis. He maintains that it would be "irrational[]" to apply *Brecht* in the absence of a *Chapman* analysis because the state court decision would be "contrary to" the *Chapman* decision, in violation of § 2254(d) of AEDPA. PBM 27. In such a case, petitioner contends, the federal court would be required "to give the prisoner the benefit of a harmlessness review under the *Chapman* standard." PBM 27. This logic does not hold.

As already noted, a substantial number of federal habeas cases involve no previous harmless-error analysis by state courts. Taken to its logical conclusion, petitioner's argument would result in a sharp reduction in the application of the *Kotteakos* standard, as called for by

*Brecht*, and a wholesale return to the *Chapman* standard. There is no reason to believe that such a result was intended by Congress. One will look in vain for any change in the law effectuated by the habeas reform provisions of AEDPA that enhance rather than contract the availability of relief for a state prisoner. The reforms work only in one direction: to reduce the availability of the writ. See *Miller-El* v. *Cockrell*, 537 U.S. 322, 337 (2003) ("Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners."); see also *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000) (AEDPA imposed "a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus").

Congress presumably was aware of *Brecht* when it enacted AEDPA, yet nothing in the text or the legislative history of AEDPA alludes to an alteration in the federal harmless-error doctrine in relation to state court decisions that are silent about harmless error, or to decisions, such as in the instant case, that reflect a state court's resolution of the claim on state law grounds. J.A. 97. As amended by AEDPA, 28 U.S.C. § 2254(d) mandates that habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim" is either "contrary to" or an "unreasonable application of" clearly established federal law, as defined by the Supreme Court, or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." AEDPA does not *require* or even allow federal habeas courts to grant relief to a petitioner just because he succeeds in overcoming § 2254(d)'s threshold impediment to relief. Nor may the statute be read to preclude federal courts from

examination and review of state judgments under standards of review established by this Court, such as *Brecht* itself, when those standards are consistent with the language and purpose of AEDPA.[5]

Respondent's position is consistent with this Court's holding in *Mitchell* v. *Esparza*, 540 U.S. 12 (2003) (per curiam). In *Mitchell*, this Court considered the Sixth Circuit's decision that the state court's failure to instruct on an element of a capital offense had amounted to structural constitutional error, not susceptible to harmless-error review. Applying the deferential-review provisions of § 2254(d)(1), this Court reversed. First, the Court explained, it was not "contrary to" Supreme Court precedent to subject the petitioner's claim to harmless-error review. The AEDPA question then became, in this

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[5] Petitioner's reliance on *Eddleman* v. *McGee*, 471 F.3d 576 (6th Cir. 2006), PBM 27 n.19, is curious. First, *Eddleman* expressly recognizes that an application of *Brecht* is appropriate on collateral review where the state court has not conducted harmless error analysis: "[A]s we frequently have noted and the Supreme Court has confirmed, the *Brecht* standard continues to apply when federal courts must make a harmless-error determination in the first instance, as when a state court found no error and therefore did not address whether an error would be harmless." *Id.* at 583 n.3. Accordingly, *Eddleman* expressly contradicts petitioner's position in this case. Second, *Eddleman*'s approach to AEDPA jurisprudence is incorrect. *Eddleman* asserted that in cases where the state court has found harmless error, the state is entitled to less deference than when it has not found error at all. *Id.* at 584. It then posited that the deference standard of AEDPA protects a smaller "set of errors" in state trials than would be protected under *Brecht* review, and is "less deferential to the state court than the *Brecht* standard." *Id.* at 583 n.2. This conclusion cannot be correct. As this Court has stated, the effect of AEDPA was "to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell* v. *Cone*, 535 U.S. 685, 693 (2002). A reading of AEDPA that is "less deferential" to the state courts is contrary to the basic tenets of AEDPA.

Court's words, whether the state court had "applied harmless-error review in an 'objectively unreasonable' manner." 540 U.S. at 18. Concluding under the circumstances that the state court's harmless-error ruling was "hardly objectively unreasonable," this Court explained that "we may not set aside its decision on habeas review." *Id.*

Because it rejected the Sixth Circuit's holding that the state court had improperly engaged in harmless-error analysis, and also found that there had been no "objectively unreasonable" application of the *Chapman* harmless-error formulation, it was neither necessary nor prudent for the Court to reach the *Brecht* question. Presumably, had the Court found an unreasonable application of *Chapman* under § 2254(d)(1), it would not have affirmed the issuance of the writ unless the record demonstrated both a violation of the Constitution and prejudice under the *Brecht* standard. See *Penry* v. *Johnson*, 532 U.S. at 791 (indicating that if state court's action was contrary to or an unreasonable application of clearly established Supreme Court law, writ relief is possible "only" if *Brecht* standard is satisfied); *Early* v. *Packer*, 537 U.S. 3, 10-11 (2003) (per curiam) (inquiry into prejudice under *Brecht* "proper" if state court's ruling was "contrary to" clearly established Supreme Court law); see also *Calderon* v. *Coleman*, 525 U.S. at 147 (recognizing, in habeas proceedings, that constitutional errors must prejudice petitioner under *Brecht* standard before relief can be granted). Certainly, given the defining purpose of AEDPA's habeas corpus reforms, § 2254(d) did not free up the writ from *Brecht*'s strictures to make it more available now than it was before.

The principles embodied in AEDPA are fully consistent with *Brecht*'s harmless-error standard and its justification for that standard. The themes that pervade *Brecht*—respect for the sovereign States' interests in the integrity of their own judicial processes and the finality of convictions that have survived direct review within the state court systems—are echoed in AEDPA. That legislation was enacted, in large part, to ensure comity, finality, and deference to state court judgments by limiting the scope of collateral review and raising the standard for federal habeas relief. See 28 U.S.C. § 2254(d)(1)-(2); *Calderon* v. *Thompson*, 523 U.S. 538, 554-55 (1998) (discussing judicial limits on habeas relief guiding discretion consistent with the objects of AEDPA); *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000) ("AEDPA's purpose [was] to further the principles of comity, finality, and federalism. There is no doubt Congress intended AEDPA to advance these doctrines."). Application of the *Brecht* standard to state court judgments parallels this congressional intent.

## II.

## PETITIONER WAS NOT PREJUDICED BY THE EXCLUSION OF MAPLES'S TESTIMONY

Because the *Brecht* standard should be applied to determine prejudice before petitioner may obtain relief in this case, the question remains whether the exclusion of Maples's testimony had a "substantial and injurious effect or influence in determining the jury's verdict."[6] Petitioner

[6] Given the strength of the case against petitioner, respondent has demonstrated that the exclusion of Maples's testimony was also harmless beyond a reasonable doubt. Respondent concedes, as it did in district court, that once a deprivation of constitutional rights has been

(Continued on following page)

maintains that it did, but he fails to fully credit the case against him. All courts that have reviewed this matter have found that the exclusion of Maples's testimony did not prejudice petitioner. "Prejudice" requiring correction by the writ of habeas corpus does not appear.

## A. The Case Against Petitioner Was Substantial

The prosecution presented a very strong case of petitioner's guilt. Victim Cynthia Bell had broken into petitioner's home only days before the murder. Petitioner had threatened to kill her. He had been behaving erratically in the days leading up to the murder, kicking in a door and firing his gun out the window of his truck while threatening his passenger. On the night of the killings, he returned home spotted with blood. He carried the murder weapon, which was bloody and contained four spent shells. He told his brother, his friend and his housemate that he had shot and killed the victims, and described the specifics of the shooting in graphic detail. He confessed again to a former co-worker. He led police on a high-speed chase when an arrest was attempted, demonstrating consciousness of guilt.

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shown, the ultimate burden of persuasion is on the State. See *O'Neal* v. *McAninch*, 513 U.S. at 438-39 (the state bears "the risk of doubt"); see also *United States* v. *Dominguez Benitez*, 542 U.S. at 82 n.7 ("When the Government has the burden of showing that constitutional trial error is harmless because it comes up on collateral review, the heightened interest in finality generally calls for the Government to meet the more lenient *Kotteakos* standard.") Given respondent's concession throughout the litigation, there is no reason to believe that the district court improperly allocated the burden in the proceedings below. Nor, in any event, is there any indication that the Ninth Circuit did so. The panel opinion does not allude to burden and circuit law binding on the panel had made it clear that the ultimate burden of persuasion rested on the State.

Significantly—and unlike the prior trials which ended in hung juries—petitioner's gun, the circumstances of its concealment and discovery, and the ballistics evidence linking it to the murders were introduced at the third trial under review here. In addition, petitioner admitted giving his brother's name and address to Jacobitz, lending credence to Jacobitz's testimony that petitioner had confessed to him and had asked him to intimidate his brother into changing his damning testimony.

### B. Maples's Testimony Lacked Probative Value

In his brief, petitioner suggests that Hurtz was "the actual killer" and that the jury would have found petitioner not guilty had Maples been permitted to testify. PBM 35. At trial, however, the defense painted a different picture. Petitioner presented a "reasonable doubt" defense with three components: an alibi for the time of death; attacks on the credibility of the prosecution witnesses; and evidence of third-party culpability. J.A. 70. As to third-party culpability, petitioner suggested that *either* Borelli, Bernal, *or* Hurtz killed the Bells.[7] The force of this defense was diminished by the inherent contradiction created by targeting multiple candidates as the "actual killer."

Contrary to petitioner's assertion, Maples did not offer credible and reliable evidence of petitioner's innocence. The central thesis of a third-party confession establishing innocence is that, if the third party committed the killing,

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[7] The prosecutor pointed out the weakness of this approach in closing argument: "[I]n terms of the actual perpetration, Mr. Borelli did it, Mr. Hurtz did it, Mr. Bernal . . . did it. Take your pick. It's a shotgun approach." R. 5101.

then the defendant did not. In order for this logic to hold, the statement by the third party must (1) take credit for the killing at issue, not some other killing, and (2) be made in circumstances that suggest reliability. See *Chambers* v. *Mississippi*, 410 U.S. at 300. Both of these factors are missing here.

Petitioner's assertion that Maples "heard Mr. Hurtz confess to committing the crime for which Mr. Fry is now imprisoned," PBM 32, is inaccurate. Maples never testified that Hurtz said that he killed the Bells, nor did Maples identify the location or time of the killings. At most, Maples testified that she heard her cousin confess to shooting a man and a woman in a parking place. But even that conclusion is exceedingly questionable. It is not at all clear Maples testified to any "confession," let alone a confession worthy of credit by the jury. Maples was unable to say even whether she thought Hurtz was "serious" when she overheard him. J.A.10-11. She did not hear how the conversation started or ended. She only heard "bits and pieces" and was walking in and out of the room. J.A. 9-10. To have probative value, a third-party confession must be serious and concern the charged crime. Statements, which for all that appears might amount to jokes or storytelling, would receive no credence from the jury. There was little, if any, assurance the statements of Hurtz recounted by Maples surmounted even that minimal test.[8]

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[8] It was due to these fundamental defects in Maples's testimony that respondent argued in the courts below, and continues to assert, that the trial court did not err by excluding her testimony. See *People* v. *Hall*, 41 Cal. 3d 826, 833, 718 P.2d 99, 104, 226 Cal. Rptr. 112, 116 (1986) ("[T]here must be direct or circumstantial evidence linking the

(Continued on following page)

### C. Petitioner's Other Arguments Are Unpersuasive

1. Petitioner concedes that he was permitted to present extensive evidence implicating Hurtz. In total, seven other witnesses at trial testified about Hurtz's confessions and incriminating admissions. J.A. 179 (Chantelle Eittreim, Candida Eittreim, David Eittreim, Kenneth Keith, Harmina Ross, Eliane West, and George McCleese). Recognizing that impeachment and bias problems infected the testimony of all of these witnesses, petitioner contends that Maples was essentially the only third-party culpability witness who could survive a jury credibility assessment, since she was his cousin with no apparent bias.

But bias was only one problem the seven other witnesses faced. As noted by the state court, a second problem faced by those witnesses was their "failure to give timely, truthful information to the police." J.A. 73. And Maples would have been impeached for the same reason: the conversation she overheard occurred in April of 1994, but she did not call the police and report the "confession" or otherwise come forward until contacted by the defense midway through the third trial. J.A. 18. Moreover, Maples would have been severely discredited on cross-examination because she conceded that she heard only "bits and pieces" of what Hurtz said, was not present when he started and finished talking, and was unclear on the context of what

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third person to the actual perpetration of the crime."); see also Respondent's Opposition to Writ of Certiorari, at 6 ("relevant evidence can be curtailed" without violating the Constitution when its probative value is weighed against "confusion of the issues, or potential to mislead the jury" by a state statute, such as California Evidence Code § 352) (citations omitted).

he was saying. Given these weaknesses, Maples was no more credible than the defense witnesses who did testify. The jury rejected the testimony of the seven witnesses who stated without qualification that Hurtz admitted to the crime; the testimony of one more witness who could not offer such unqualified evidence could not have affected the jury's evaluation of the case.

Petitioner's defense suffered heavy blows, but the exclusion of Maples's testimony was not one of them. The third-party culpability defense was greatly weakened by his dragooning three other potential killers before the jury, and by his failure to make any credible case that he was exculpated if the others, or some subset of them, were involved. The attacks on the prosecution witnesses were rejected by the jury. As to the asserted alibi, petitioner focused on the testimony of truck driver Russell Carter, who claimed to witness the killings at 6:50 a.m. Because the bodies had already been discovered and 911 called by that time, Carter's testimony "was unbelievable and contrary to all the other evidence in the case." J.A. 72. Maples's testimony would have amounted to a mere sideshow in the context of the overall defense such as it was.

2. Petitioner's idea that, if someone else confessed he then must be innocent, does not survive close examination. The assertion by the defense of multiple confessions to these murders by assorted people, none of whom were otherwise connected to the offense by physical evidence, bespeaks a lack of reliability of all those confessions.[9]

[9] Defense witness McCleese conceded that it was "not uncommon" for criminals to claim involvement in crimes to "look big" and gain status in the jail environment. R. 4475-76. McCleese said Hurtz had a

(Continued on following page)

The state court characterized the "evidence of the purported third party culpability of Borelli, Hurtz and Bernal" as "both contradictory and weak." J.A. 73. The "supposed 'confessions' were themselves ambiguous and self-contradictory." J.A. 73. Petitioner fails to consider the most likely explanation for these third-party statements: that they represented bragging and puffing. It is hardly surprising that a drug dealer might claim false credit for drug murders to enhance his reputation, especially if another man was being prosecuted for the crime.

3. Petitioner's focus on the prior hung juries and on the length of deliberations is faulty. The discovery of petitioner's gun was the pivotal moment in the case. Even petitioner's defense counsel immediately conceded this, acknowledging that discovery of the weapon and its subsequent testing was "certainly . . . going to make a lot of difference in this case . . . " R. 2404. In addition, petitioner partially corroborated his jailhouse confession by acknowledging that he gave his brother's name and address to Jacobitz. R. 3743-44. The jury's requests to rehear testimony by the ballistics expert (R. 5167-68) and by Jacobitz (R. 5247) show the newly discovered evidence was of great significance. Its absence from the first two trials renders irrelevant the earlier jury deadlocks.

Petitioner's emphasis on the length of jury deliberations is also misplaced. This was an eleven-week trial involving testimony from more than 100 witnesses. R. 4995, 5005. Deliberations began on May 4, 1995, and the jury returned its verdicts on June 8, 1995. R. 5060, 5337. The jury deliberated for 24 court days, with deliberations

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reputation as a "loud talker," and McCleese did not believe Hurtz when he claimed involvement in the killings of the Bells. R. 4474-75.

cut short on two of those days due to illness (R. 5133) and to accommodate a juror's appointment, (R. 5166). The trial court characterized the jury as "conscientious" and defense counsel agreed. R. 5315. There were twenty-four requests by the jury for readbacks of testimony. Nearly every day of deliberations included readbacks. In context, the length of deliberations was not extraordinary.

The excluded testimony of Maples was not of a nature and quality that would have altered the outcome of this case.

## CONCLUSION

Respondent respectfully requests that the judgment be affirmed.

Dated: February 22, 2007

Respectfully submitted,

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In The

# Supreme Court of the United States

JOHN F. FRY,

*Petitioner,*

v.

CHERYL K. PLILER, Warden,

*Respondent.*

**On A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

In their rush to read *Brecht*[1] as deciding a question it did not reach, respondent and its *amici* overlook the posture the case was in when it came to the Court. *Brecht* adopted the *Kotteakos*[2] standard within a context in which *Chapman*[3] review had been conducted in state court. A critical component of the rationale for adopting this standard on federal habeas is that there is no need for a federal court to duplicate a state court's harmless-error analysis. Because, as respondent concedes, no *Chapman* review was conducted during Mr. Fry's state court appeal, extending the holding in *Brecht* to this case would be inconsistent with the factual moorings and rationale of *Brecht*.

*Chapman* harmless-error analysis is mandated on direct review in cases such as Mr. Fry's, where *Chambers*[4] error occurred in a state jury trial. The exacting *Chapman* standard provides a necessary safeguard against erroneous convictions of innocent defendants. If state courts fail to assess the effect of *Chambers* error under the *Chapman* standard, the duty to do so falls upon a federal habeas court. Indeed, *Chapman* review by the federal court in such a case is a necessary element of reviewing the state trial *and appellate* proceedings.

If the *Chambers* error in this case is held to be subject to review under the *Brecht-Kotteakos* standard, because this case is on federal habeas review, the error still must be deemed prejudicial. After nine days of deliberations in Mr. Fry's third trial, and after casting four ballots, the jurors indicated that they were deadlocked seven-to-five.

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[1] *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

[2] *Kotteakos v. United States*, 328 U.S. 765 (1946).

[3] *Chapman v. California*, 386 U.S. 18 (1967).

[4] *Chambers v. Mississippi*, 410 U.S. 284 (1973).

Thus, well into the deliberations, at least five jurors had voted that Mr. Fry was not guilty. Notwithstanding respondent's contention that the evidence against Mr. Fry in the third trial was stronger than the evidence against him in the first two trials, the jury plainly viewed the case as a close one. Furthermore, as the panel majority in the Ninth Circuit found, the unconstitutionally excluded evidence "would have substantially bolstered [Mr. Fry's] claim[] of innocence." J.A. 212 (internal quotation marks omitted). Thus, the injurious effect of keeping that evidence from the jury in this case is self-evident.

## I. THE PREJUDICIAL IMPACT OF *CHAMBERS* ERROR MUST BE ASSESSED UNDER THE *CHAPMAN* STANDARD BY AT LEAST ONE REVIEWING COURT.

Respondent argues that it does not matter now whether Mr. Fry's conviction would have been reversed in the state appellate court had *Chapman* been applied. Resp. Br. at 10, 14, 20. According to respondent, because this case is now on collateral review in federal court, a state court's erroneous failure to apply the *Chapman* standard is irrelevant to the issues on federal collateral review. Resp. Br. at 21-22.

Respondent and its *amici* have offered no sound justification to apply the *Brecht-Kotteakos* standard in a case such as the instant case. When a trial court unconstitutionally excludes evidence that someone other than the accused committed the charged crime, the accused is entitled, under the terms of *Chapman*, and under the rationale of *Brecht*, to have at least one reviewing court assess the effect of that error under the *Chapman* standard.[5] If a state court fails to adhere to its Article VI duty

[5] The right of one convicted of crime to have the effect of constitutional error reviewed under this exacting standard is coextensive with

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to apply this constitutional safeguard, *Brecht*, 507 U.S. at 636, it is incumbent upon an Article III court to do so. *Reed v. Ross*, 468 U.S. 1, 10 (1984).[6] This conclusion follows not only from basic fairness and the need to give effect to this Court's decision in *Chapman*, but also from the fact that collateral review of state proceedings includes review of a state appellate court's mode of harmless-error analysis, *Mitchell v. Esparza*, 540 U.S. 12, 17-19 (2003) (*per curiam*), as well as the underlying constitutional error. Respondent's position ignores the state appellate error and assumes that federal collateral review is focused solely on trial error.

### A. The Holding in *Brecht* Does Not Extend to Cases in Which There Has Been No Prior *Chapman* Review.

This Court does not "decide abstract, hypothetical or contingent questions. . . ." *Clinton v. Jones*, 520 U.S. 681, 690 n. 11 (1997). Rather, this Court decides cases with

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the right to a trial without constitutional violations. *Chapman*, 386 U.S. at 21.

[6] Respondent states that Mr. Fry could have received *Chapman* review by filing a petition for a writ of certiorari in this Court following the California Supreme Court's denial of his petition for review, but that he did not seize upon that opportunity, thereby forsaking any entitlement he may have had to *Chapman* review. Resp. Br. at 21-22. However, Mr. Fry, who is indigent, had no right to counsel in connection with preparing a certiorari petition. *Austin v. United States*, 513 U.S. 5, 8 (1994); *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974). He is not versed in the "arcane art of preparing petitions for discretionary review. . . ." *Ross*, 417 U.S. at 616. Hence, to the extent respondent posits the theoretical possibility of Mr. Fry, without counsel, having received *Chapman* harmless-error analysis on direct review in this case, respondent's position is illusory. *See Evitts v. Lucey*, 469 U.S. 387, 396 (1985) ("An unrepresented appellant – like an unrepresented defendant at trial – is unable to protect the vital interests at stake.").

reference to the particular facts and issues before the Court. *Id.*; *Brecht*, 507 U.S. at 630-631 (citing *Edelman v. Jordan*, 415 U.S. 651, 670-671 (1974)). *Brecht* was decided on a record in which *Chapman* review had been conducted in state court. Respondent seeks to extend the holding in *Brecht* beyond that factual context, to a case in which no *Chapman* review was conducted in state court. However, this Court has "yet squarely to address" *Brecht*'s applicability in such a context. *Brecht*, 507 U.S. at 630.

If this Court had squarely addressed the issue, there would be no split of authority concerning the issue. Many courts and jurists have recognized that the holding in *Brecht* does not extend to cases in which there has been no prior *Chapman* review.[7]

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[7] The Eighth Circuit and several district courts have held that *Chapman*, rather than *Brecht*, applies when a federal habeas court is the first to conduct harmless-error review under *Chapman*. 2 R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 31.1, at 1507 n. 19 (5th ed. 2005) (collecting cases from the Eighth Circuit); *Atwood v. Mapes*, 325 F.Supp.2d 950, 975-976 (N.D. Iowa 2004); *Lyons v. Johnson*, 912 F.Supp. 679, 687-689 (S.D.N.Y. 1996), *aff'd.*, 99 F.3d 499 (CA2 1996); *Rickman v. Dutton*, 864 F.Supp. 686, 712 (M.D. Tenn. 1994), *aff'd. sub nom., Rickman v. Bell*, 131 F.3d 1150 (CA6 1997); *see also Monsanto v. United States*, 143 F.Supp.2d 273, 286 (S.D.N.Y. 2001) (holding the *Brecht* standard to be inapplicable in a 28 U.S.C. § 2255 case in which no prior *Chapman* review has been conducted), *aff'd.*, 348 F.3d 345 (CA2 2003), *cert. denied*, 543 U.S. 831 (2004). A number of circuit judges have dissented from holdings that *Brecht* applies when there has been no *Chapman* review in state court. *See, e.g., Bains v. Cambra*, 204 F.3d 964, 982 n. 4 (CA9) (Canby, J., dissenting) (noting that rejection of the *Chapman* standard in 28 U.S.C. § 2254 cases in which state courts have failed to conduct harmless-error review under *Chapman* "appears to be inconsistent with the underlying rationale of *Brecht*"), *cert. denied*, 531 U.S. 1037 (2000); *Horsley v. Alabama*, 45 F.3d 1486, 1498 n. 3 (CA11) (Thatchett, J., dissenting), *cert. denied*, 516 U.S. 960 (1995).

### B. A Critical Component of the Rationale of *Brecht* Is That the *Chapman* Standard Need Not Be Applied on Federal Habeas When a State Court Has Already Conducted *Chapman* Review.

As framed by the Court, the very issue under consideration in *Brecht* was "whether *the same* harmless-error standard that *the state courts applied* on direct review" applies on federal habeas review. *Brecht*, 507 U.S. at 635-636 (italics added). This issue was resolved in light of, rather than in spite of, the fact the state courts had conducted *Chapman* review. *Id.* at 636; Pet. Br. at 24-25. Thus, contrary to respondent's position, Resp. Br. at 10, 14, 20, the fact that *Chapman* review had been conducted by the state courts in *Brecht* was integral to the holding in *Brecht*. The Court's discussion regarding the significance of the state-court *Chapman* review was not a "minor, makeweight" portion of the decision. CJLF Br. at 7-8.[8]

Unlike the situation in *Brecht*, respondent concedes that no *Chapman* review was conducted in state court in this case. Missouri Br. at 10.[9] Thus, the key rationale that

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[8] Although this Court's holding in *Brecht* was based on other considerations, including principles of finality, federalism, and comity, which are germane across the spectrum of § 2254 cases, the fact remains that "the *Brecht* majority apparently premised these justifications on an assumption that a finding of harmlessness by the state courts under the more stringent *Chapman* rule always will precede habeas corpus review of the harmlessness question under the less stringent *Brecht* rule. . . ." 2 Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* § 31.1, p. 1507 n. 17.

[9] Respondent asserts that its concession that no *Chapman* review was conducted in state court is attributable to a purported concession by Mr. Fry during direct review. According to respondent, Mr. Fry conceded in the state appellate court that California's harmless-error standard for non-constitutional error, rather than the *Chapman* standard, "was the controlling standard[.]" Resp. Br. at 7 n. 3. Mr. Fry made no such concession. To the contrary, his appellate counsel argued that California cases which apply a *Kotteakos*-type harmless-error

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led to this Court's adoption of the *Kotteakos* standard in *Brecht* is not present in the instant case.

Furthermore, limiting application of the *Brecht-Kotteakos* standard to cases in which there has been state-court review under *Chapman* will retain *Chapman*'s essential role as a safeguard against erroneous convictions of innocent defendants, Pet. Br. at 28-29; Inn. Net. Br. at 9-16, thereby preventing "unfair and mischievous results. . . ." *Chapman*, 386 U.S. at 22.

### C. The Passage of AEDPA Does Not Support Application of the *Brecht* Standard in a Federal Habeas Case in Which There Has Been No *Chapman* Review in State Court.

Respondent suggests that the post-*Brecht* congressional curtailment of the range of federal habeas relief brought about by AEDPA fortifies the position that *Brecht* applies across the board. Resp. Br. at 26-30. The provisions of AEDPA that purportedly support this proposition are contained in 28 U.S.C. § 2254(d). These provisions limit the availability of federal habeas relief to petitioners whose claims were adjudicated in state court in a manner contrary to this Court's precedent and/or in a manner that involved an objectively unreasonable determination of the facts or an objectively unreasonable application of this Court's precedent. *Id.* In a case such as Mr. Fry's, where a

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standard in reviewing *Chambers* error "make[] no sense[,]" and that the *Chapman* standard is applicable in such cases, for the reasons expressed by Justice Kennard in her dissenting opinion in *People v. Cudjo*, 6 Cal.4th 585, 637-642, 863 P.2d 635, 25 Cal.Rptr.2d 390 (1993). *See* Appellant's Opening Brief at 106-108, *People v. Fry*, Docket No. A072396, California Court of Appeal, First Appellate District, Division Three. (A copy of the relevant portion of the state appellate brief, which was included in the record in the district court and the Ninth Circuit, is attached hereto as Appendix A.)

state appellate court failed to identify constitutional error and failed to review the effect of the error pursuant to the *Chapman* standard, but instead applied a *Brecht*-like standard,[10] § 2254(d)'s threshold limitations have been overcome. No provision of AEDPA calls for application of a particular harmless-error standard once a petitioner has passed through § 2254(d)'s gateway. In fact, a federal court's application of *Brecht* rather than *Chapman* in a case where the state court's failure to apply *Chapman* was cognizable error under AEDPA would at once condemn and ratify the error.

### D. The Manner of Review on Federal Habeas Depends Upon What Occurred (Or Did Not Occur) in State Court, Such as the Failure of a State Reviewing Court to Conduct *Chapman* Harmless-Error Analysis.

Respondent seems to suggest that it is a novel idea for federal court treatment of a habeas claim to be dependent upon antecedent state action. Resp. Br. at 19-23. It is not. For example, a federal habeas court's application of 28 U.S.C. § 2254(d) depends on whether there was a state court adjudication of the claim on the merits. *Williams v. Taylor*, 529 U.S. 362, 404 (2000). If the state court did adjudicate the claim on the merits, but applied the wrong legal standard, a federal habeas court is "unconstrained" by § 2254(d). *Id.* at 406.[11] Thus, there is ample support not

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[10] Pet. Br. at 11; Resp. Br. at 7 n. 3; *Duncan v. Henry*, 513 U.S. 364, 370 n. 1 (1995) (Stevens, J., dissenting) (noting, with reference to the standard applied by the state appellate court in the instant case, that it is "essentially the same" as *Brecht*).

[11] Similarly, in the procedural default context, a federal habeas court's application of a procedural bar, on the basis of a petitioner's failure to comply with a state procedural rule, is dependent upon the state court actually applying the procedural bar. If the state court did not

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only in *Brecht*, but also elsewhere in this Court's habeas jurisprudence, for tying a particular mode of federal habeas review to the state judiciary's application or non-application of relevant legal principles.

A federal habeas court's treatment of a habeas claim involving a harmless-error issue depends upon how the issue was handled by the state appellate court. *Mitchell v. Esparza*, 540 U.S. at 17-19. However, respondent and its *amici* suggest that the manner in which a federal habeas court conducts harmless-error review "does not depend on whether the state court first undertook a harmless-error inquiry." Resp. Br. at 14; U.S. Br. at 21-22; Missouri Br. at 5-6; CJLF Br. at 6. This position artificially isolates the constitutional error at trial from constitutional error in the state reviewing court.

When a federal court reviews a state appellate decision in which the state court applied *Chapman*, but did so in an unreasonable manner, the federal court needs to determine what the outcome would have been in the state court had *Chapman* been reasonably applied. *Mitchell v. Esparza*, 540 U.S. at 18 ("habeas relief is appropriate . . . if the [state appellate court] applied harmless-error review in an objectively unreasonable manner"). Similarly, when a federal court reviews a state appellate decision in which the state court failed to apply *Chapman*, it is necessary for the federal court to determine what the result would have been had *Chapman* been applied.[12] Thus, even if federal habeas review of this nature were susceptible of being conducted under the auspices of the *Brecht-Kotteakos* standard, that review would necessarily entail an indirect *Chapman* analysis: The petitioner would not be entitled to relief if application of *Chapman* in the state court would

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do so, a federal habeas court is free to consider the merits of the petitioner's claim. *See Wainwright v. Witt*, 469 U.S. 412, 431 n. 11 (1985).

[12] A possible alternative would be a remand to state court with directions to conduct a *Chapman* harmless-error inquiry.

not have resulted in reversal. However, the petitioner would be entitled to relief if application of the *Chapman* standard in the state court would have resulted in reversal, because in such a case, the failure to apply *Chapman* would have resulted in substantial injury.

## II. THE *CHAMBERS* ERROR IN THIS CASE IS NOT HARMLESS UNDER THE *BRECHT* STANDARD.

In arguing that the *Chambers* error here was harmless, respondent places great significance on two categories of evidence introduced in the third trial but not in the first two trials, namely, Mr. Fry's gun (and related ballistics testimony) and the testimony of a jailhouse informant. Resp. Br. at 32, 36. The simple response is that the jury in the third trial spent 23 days in deliberations,[13] and, after day nine, had declared itself deadlocked. Thus, from the jury's perspective, the case was close even with the new evidence. Further, on closer analysis than that offered by respondent, it is apparent that the new evidence did not strengthen the prosecution's case.

The prior, evenly-divided hung juries, the third jury's declaration of deadlock, its request for clarification of the reasonable doubt standard, the exculpatory evidence actually admitted, and the nature of the unconstitutionally excluded testimony, are all circumstances that militate against a finding of harmlessness under any prejudice standard.

### A. The Gun

Respondent and its *amici* state as undisputed fact that Mr. Fry's gun, which was discovered during the third trial, was the murder weapon. Resp. Br. at 1 (referring to

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[13] Respondent states that the jury deliberated for 24 court days. Resp. Br. at 36. The district court calculated that there were 23 court days of deliberations. J.A. 198.

Mr. Fry's gun as "the murder weapon"); Missouri Br. at 1 (same); U.S. Br. at 3 (asserting that the evidence "established that one of the bullets recovered from the victims had definitely been fired from petitioner's gun"). Not so.

Although a criminalist called by the prosecution testified that Mr. Fry's gun was the murder weapon, a defense ballistics expert, whom the prosecution conceded to be credible, testified that Mr. Fry's gun could not be identified as the murder weapon. Pet Br. at 5-6 & n. 3; Tr. 4516, 4518-4519, 4546. The defense ballistics expert, Charles V. Morton, has impressive credentials. Mr. Morton has a Master's Degree in criminalistics from the University of California at Berkeley. Tr. 4504. As of the time of his testimony in Mr. Fry's third trial, he had been involved in firearm identification for over 30 years. He has qualified to testify as a ballistics expert for both the prosecution and the defense in numerous cases in many state and federal courts. Tr. 4506. In 1975, Mr. Morton was one of five criminalists from around the country selected to re-examine the ballistics evidence in the Robert F. Kennedy assassination. Tr. 4525, 5069.

Moreover, there was evidence that a possible cohort of Mr. Hurtz's in the murder of the Bells, was in possession of Mr. Fry's gun after the murders. The defense adduced evidence that this cohort, Darryl Borelli, had met with Mr. Hurtz "at a Denny's [restaurant] in order to plan the homicides. . . ." J.A. 173. However, the trial court excluded the evidence proffered by the defense concerning Mr. Borelli's post-homicide possession of the gun. J.A. 98-101; Tr. 525, 553-554, 4762. The state appellate court held that the trial court erred by excluding this evidence, but treated the error as harmless under the California standard for reviewing non-constitutional errors. J.A. 98, 106-107, 192-193.

Thus, the gun may or may not have been the murder weapon, and even if it were, there is evidence that, after the murders occurred, it was in the possession of an

individual who may have participated in the murders with Mr. Hurtz. Such being the case, the gun hardly bolsters respondent's position that the State's case was sufficiently strong to render the unconstitutional exclusion of Ms. Maples' testimony harmless.

### B. The Jailhouse Informant

A jailhouse informant, Robert Jacobitz, testified in the third trial that Mr. Fry confessed to him that he had planned and carried out the shooting of the Bells. Tr. 973-985. However, Mr. Jacobitz's testimony was unreliable, and it does not support respondent's position vis-à-vis the harmless-error inquiry.

Mr. Jacobitz has suffered numerous prior convictions, including convictions for robbery, burglary, grand theft, and transportation and sale of drugs. Tr. 937-938, 1004-1005, 1011-1013, 1110-1114, 1120, 1123, 4429-4431. In the period of time leading up to Mr. Fry's third jury trial, Mr. Jacobitz was incarcerated in the Solano County Jail on felony domestic violence charges. Tr. 937. During this period of time, he had contact with Mr. Fry, and he struck a deal with the State to testify against Mr. Fry. In exchange for his testimony, Mr. Jacobitz's felony domestic violence charges were reduced to misdemeanor charges, and the State agreed to 1) grant him a diversionary disposition,[14] 2) seek to avoid having his parole status revoked, and 3) secure his release from custody. Tr. 1004-1005, 1120, 1123, 4429-4431. Mr. Jacobitz also requested the State to assist him in obtaining a job upon his release from custody. Tr. 1011-1012.

Much of Mr. Jacobitz's testimony simply tracked newspaper accounts regarding the case, to which he had

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[14] A diversionary disposition can result in dismissal of criminal charges. *See* former Cal. Penal Code §§ 1000.6-1000.11; *People v. Laino*, 32 Cal.4th 878, 897 n. 12, 87 P.3d 27, 11 Cal.Rptr.3d 723 (2004).

access. His testimony that Mr. Fry had purportedly shot James Bell three times is inconsistent with the undisputed testimony of the State's pathologist that eight bullet wounds were found during the autopsy of Mr. Bell. Tr. 1019-1026, 1509-1515, 5057. And, as Mr. Fry's trial counsel noted in closing argument, a stipulation between the parties revealed that Mr. Jacobitz was lying about the time frame in which he purportedly heard Mr. Fry making incriminating admissions. Tr. 5056. The prosecutor did not dispute this point in his summation.

Despite the foregoing circumstances, respondent suggests that the jailhouse informant testimony strengthened the prosecution case. If anything, however, the prosecution's resort to the testimony of a jailhouse informant unveils the prosecution's own understanding of the weakness of its case: Prosecutors "tend[] to use jailhouse informant testimony only when a case is 'weak[.]'" J. Winograde, *Jailhouse Informants and the Need for Judicial Use Immunity in Habeas Corpus Proceedings*, 78 Calif. L. Rev. 755, 757 (1990).

"The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility." *On Lee v. United States*, 343 U.S. 747, 757 (1952). "By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom." *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (CA9 1993); S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings L. J. 1381, 1383 (1996).[15] Because dishonesty is a

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[15] *See* D. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 Colum. L. Rev. 801, 824

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common "characteristic" of jailhouse informants, state and federal courts have developed standardized jury instructions, explaining to jurors that the testimony of such individuals is to be viewed with great caution. *Plascencia v. Alameida*, 467 F.3d 1190, 1199 (CA9 2006).

In light of the foregoing, it is not surprising that courts conducting prejudice inquiries routinely disregard ostensibly damning testimony from jailhouse informants. *Fulcher v. Motley*, 444 F.3d 791, 810-811 (CA6 2006); *Zappulla v. New York*, 391 F.3d 462, 470 & n. 3 (CA2 2004), *cert. denied*, 126 S.Ct. 472 (2005). This Court should decline to follow respondent's suggestion to give great weight to the testimony of this jailhouse informant in the context of harmless-error analysis.

### C. The Two Prior, Evenly-Divided Hung Juries

Because the gun evidence and the jailhouse informant testimony – i.e., the two items of evidence that respondent sees as distinguishing the third trial from the first two, Resp. Br. at 32, 36 – did not significantly strengthen the prosecution's case, the fact that there were two evenly-divided hung juries before the third trial remains a significant fact in the prejudice calculus. Pet. Br. at 30 & n. 22. As this Court has observed, "'repeated attempts to convict an individual for an alleged offense . . . enhanc[e] the possibility that even though innocent he may be found guilty.'" *Arizona v. Washington*, 434 U.S. 497, 504 n. 13 (1978) (quoting *Green v. United States*, 355 U.S. 184, 187-188 (1957)); *see also Daniels v. Burke*, 83 F.3d 760, 765 n. 3 (CA6 1996) (recognizing "the argument that the risk of

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(2004); A. Natapoff, *The Faces of Wrongful Conviction Symposium: Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U.L. Rev. 107 (2006); B. Scheck, P. Neufeld & J. Dwyer, *Actual Innocence*, 126-157 (2000) (documenting numerous miscarriages of justice resulting from testimony of "jailhouse snitches").

conviction of innocent people increases on retrial") (citing J. Findlater, *Retrial After a Hung Jury: The Double Jeopardy Problem*, 129 U. Pa. L. Rev. 701, 713 (1981) (risk of wrongful conviction increases on retrial)).

### D. The Declaration of Deadlock During Deliberations in the Third Trial

After nine days of deliberations, the jury sent a note to the trial court indicating that it was deadlocked. Tr. 5154.5.[16] The court then brought the jurors into the courtroom and asked the foreperson whether there was any reasonable possibility that continued deliberations could result in a verdict. The foreperson responded: "It's my opinion, sir, that we are hopelessly deadlocked at this point." Tr. 5154.7. In response to further inquiry from the court, the foreperson indicated the jury had taken a total of four ballots. Tr. 5154.6. Then, in response to the court's inquiry as to the numerical division of the jury, the foreperson indicated, without specifying which way the jury was leaning, that the split was 7-5. Tr. 5154.6. Thereupon, the court proceeded to inquire with the individual jurors as to whether they believed the jury was hopelessly deadlocked. Eight jurors agreed with the foreperson's assessment of hopeless deadlock. One juror stated that she was undecided on the question. Two jurors indicated that they did not believe the deadlock to be hopeless. Tr. 5154.7-5154.8.

A jury's declaration of deadlock during deliberations is a circumstance that naturally tends to "weigh against a finding of harmless error." *United States v. Varoudakis*, 233 F.3d 113, 126 (CA1 2000). A "jury's 'impasse' note reveals uncertainty about . . . guilt." *Id.* at 127 (citing

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[16] In the pagination the reporter's transcript of the third trial, pages 5154.1 through 5154.10 are inserted in between pages 5154 and 5155.

*Medina v. Barnes*, 71 F.3d 363, 369 (CA10 1995)); *accord*, *United States v. Jean-Baptiste*, 166 F.3d 102, 109 (CA2 1999); *United States v. Lewis*, 651 F.2d 1163, 1169 (CA6 1981). Mr. Fry stressed in his opening brief that the jury's 7-5 deadlock during deliberations cuts against a finding of harmlessness. Pet. Br. at 30-31. Tellingly, respondent has offered no rejoinder.

### E. The Jury's Request for Further Instruction Concerning Reasonable Doubt

The fact that the jurors also made a request during deliberations for the trial court to provide them with information about the reasonable doubt standard, beyond that contained in the court's charge to the jury, J.A. 121, is yet another indication that this jury viewed the case as close. Indeed, there would have been no need for the jury's request had the jury not been struggling with the question of guilt.

### F. The Extraordinarily Lengthy Deliberations in the Third Trial

Three days before the jury returned its verdict, the trial court remarked that the jury had been given "a lot of time to deliberate, more than any other jury maybe in this county's history. . . ." Tr. 5315. Nevertheless, respondent suggests that, "[i]n context, the length of deliberations was not extraordinary." Resp. Br. 37. Whatever word one uses to describe the length of the deliberations, the fact remains that the jury deliberated for five weeks – over the course of 23 court days. J.A. 198. These deliberations followed the presentation of evidence over the course of 29 court days. J.A. 198. If, as respondent contends, the case against Mr. Fry was "very strong," Resp. Br. at 31, experience and common sense teach that it would not have taken 23 days for the jury to reach a verdict.

This Court has recognized that, in the case of "a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." *Arizona v. Washington*, 434 U.S. at 509. This risk was brought to bear in this case, as one of the jurors expressed concern to the trial court about losing her job due to the length of deliberations. J.A. 200; Tr. 5233.

In the context of harmless error analysis, courts have repeatedly characterized deliberations of substantially less duration as sufficiently lengthy to cut against a finding of harmlessness. In *Parker v. Gladden*, 385 U.S. 363 (1966) (*per curiam*), this Court found that 26 hours of deliberations following an eight-day trial "indicat[ed] a difference among [the jurors] as to the guilt of [the] petitioner." *Id.* at 365. In *Dallago v. United States*, 427 F.2d 546 (CADC 1969), where there was a six-week jury trial, and the jury deliberated for five days, the court observed that "one would expect that if the evidence of guilt was overwhelming the jury would have succumbed much sooner." *Id.* at 548, 559; *accord*, *Gibson v. Clannon*, 633 F.2d 851, 855 (CA9 1980); *Osborne v. United States*, 351 F.2d 111, 118 (CA8 1965).

In light of the foregoing, the *five weeks* of deliberations in Mr. Fry's third trial cannot be considered as anything other than a factor weighing heavily, if not decisively, against a finding of harmlessness.

### G. Disinterested Eyewitness Testimony that Someone Other Than Mr. Fry Was the Killer

As noted in Mr. Fry's opening brief, a truck-driver from Missouri, Russell Carter, who does not know Mr. Fry, testified that he witnessed the murders, and that Mr. Fry was not the killer. Thus, Mr. Fry's trial counsel argued to the jury that Mr. Fry is innocent if Mr. Carter's eyewitness

testimony was accurate. Tr. 5080-5081. Respondent suggests that the truck-driver's testimony was unbelievable and contrary to all other evidence in the case concerning the time when the murders occurred. Resp. Br. at 35. Respondent is incorrect.

Mr. Carter approximated that he observed the murders occurring shortly after 6:00 a.m. Tr. 4573. Respondent notes that the Bells' bodies were discovered shortly before 7:00 a.m., and that there was evidence that the time of death was six to twelve hours earlier. Resp. Br. at 1. However, the evidence concerning time of death was inconclusive. A civilian, who was present at the scene at approximately 7:00 a.m., thought he saw James Bell move just before the police arrived. Tr. 606, 690-691. A pathologist called to testify by the prosecution opined that the Bells had been dead for approximately three to four hours before being found. Tr. 1541-1543, 5081. Hence, Mr. Fry's trial counsel argued to the jury that Mr. Carter's testimony was consistent with the time-of-death evidence. Tr. 5081. Even if Mr. Carter was off in his approximation of the time he observed the murders occurring, the fact of the matter is that he is a disinterested witness, with no motive to falsely exculpate Mr. Fry. In each of Mr. Fry's three jury trials, Mr. Carter testified that he saw the shooting occur, that he distinctly saw the shooter, and that the shooter is not Mr. Fry. Rather, the shooter is a man who is about half the size of Mr. Fry, and who, unlike Mr. Fry, has a full head of hair. Tr. 4571-4613, 4627-4667; *see also* Exhibits J & K to Mr. Fry's Amended Petition in the District Court.[17]

[17] Mr. Carter's testimony was corroborated by the testimony of another disinterested witness who had contact with Mr. Carter shortly after Mr. Carter witnessed the homicides. Tr. 4941-4942; Pet. Br. at 6.

## H. The Nature of the Error

The trial court's exclusion of Ms. Maples' proffered testimony was *Chambers* error. J.A. 180, 212. Despite respondent's grudging refusal to acknowledge this constitutional error, Resp. Br. at 33-34 n. 8,[18] respondent's *amici* do not deny the error. U.S. Br. at 25 n. 11. The district court viewed the error as obvious. J.A. 179.[19] And, the panel majority in the Ninth Circuit acknowledged that admission of Ms. Maples' testimony "would have substantially bolstered [Mr. Fry's] claim[] of innocence." J.A. 212 (internal quotation marks omitted).

Nevertheless, respondent suggests that Ms. Maples' proffered testimony was not reliable because 1) she did not hear Mr. Hurtz say he killed the Bells, 2) she did not hear him identify the location of the killings, 3) she only heard portions of Mr. Hurtz's remarks, and 4) she did not know whether he was serious. Resp. Br. at 32-33. Therefore, according to respondent, the exclusion of Ms. Maples'

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[18] Respondent did not contend in its brief in opposition to the petition for certiorari herein that there was no *Chambers* error. And, as noted in the United States' *amicus* brief, "this case comes to the Court on the assumption that there was constitutional error. . . ." U.S. Br. at 25 n. 11. Hence, respondent's disavowal of constitutional error "now comes far too late." *See Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).

[19] With respect to the propriety of the state court's exclusion of Ms. Maples' testimony on the ground that there was purportedly no nexus between the double homicide in question and that which Ms. Maples heard Mr. Hurtz describing, the district court, after noting that Ms. Maples' proffered testimony was corroborated by the other witnesses who heard Mr. Hurtz making incriminating admissions, rhetorically asked: "Just how many double execution style homicides involving a female driver shot in the head and a male passenger also shot in a parked car could there have been in a community proximate to the victims' murder herein?" J.A. 179.

testimony was not prejudicial to Mr. Fry. However, statements such as those that Ms. Maples heard Mr. Hurtz making – third-party declarations against penal interest – are generally deemed inherently reliable, based upon "the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Williamson v. United States*, 512 U.S. 594, 599 (1994); *Chambers v. Mississippi*, 410 U.S. at 299. And, despite the fact that Ms. Maples did not hear Mr. Hurtz naming the two people he said he had killed, a number of other witnesses did testify that Mr. Hurtz had admitted to killing the Bells. J.A. 179. This is the same type of corroboration that was deemed to provide considerable assurance of reliability in *Chambers*. 410 U.S. at 298-301. Furthermore, as the panel majority in the Ninth Circuit noted, the portion of Mr. Hurtz's remarks Ms. Maples "did hear involved idiosyncratic facts exactly matching the facts surrounding the murder of Cynthia and James Bell." J.A. 212; Pet. Br. at 9 n. 9. Thus, in light of Ms. Maples' undisputed lack of bias, J.A. 212, respondent's argument that her proffered testimony lacked reliability rings hollow.

Finally, in one of the *amicus* briefs presented in support of respondent, it is acknowledged that *Chambers* error may be inherently prejudicial, i.e., that prejudice appears to be an element of a *Chambers* violation. CJLF Br. at 4-5. This may be the case. *Holmes v. South Carolina*, 126 S.Ct. 1727, 1735 (2006) (reversing without harmless-error analysis where "the petitioner proffered evidence that, if believed, squarely proved that [someone else], not petitioner, was the perpetrator"). Regardless of whether *Chambers* error is inherently prejudicial, the *Chambers* error in the instant case, like the *Chambers* error in *Holmes* and *Chambers* itself, prevented the factfinder from receiving evidence that, if believed, demonstrated the innocence of the accused. Such error cannot be considered

harmless in this case, even under the *Brecht-Kotteakos* standard, where the third jury struggled so mightily with the evidence. For, as Justice Stevens explained in his concurring opinion in *Brecht*, the *Kotteakos* standard is a "demanding" standard. *Brecht*, 507 U.S. at 641.

## CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

March 12, 2007

Respectfully submitted,

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App. 1

Appellant's Opening Brief

Argument VII

*People v. Fry*

California Court of Appeal,
First Appellate District,
Division Three

Docket No. A072396

* * *

## VII.

## THE COURT DENIED APPELLANT'S RIGHT TO PRESENT A DEFENSE AND TO A FAIR TRIAL BY EXCLUDING THE TESTIMONY OF DEFENSE WITNESS PAMELA MAPLES WHO WOULD HAVE TESTIFIED THAT SHE HEARD TONY HURTZ SAY THAT HE KILLED TWO PEOPLE IN A MANNER THAT FIT THE KILLING OF THE BELLS.

### A. Introduction

Defense counsel called Pamela Maples to the witness stand. Maples is Hurtz's cousin and testified that she does not know appellant. (RT 4137.) The prosecutor objected to Maples' testimony and the court allowed the prosecutor to voir dire her outside the presence of the jury. During that hearing, Maples testified that in April, 1994, she was present with Tammy, Hurtz and Steve when Hurtz said that he killed two people, a man and a woman. He said that he shot the woman first in the head, and then reached over and shot the man. They were in a parking place. He said there was blood everywhere and he ran into a field and threw himself in the mud before he called someone to pick him up. (RT 4138-4141.) Maples also testified that she was not present for the whole conversation and

did not know if he was serious or had made this up. (RT 4140.) She did not hear him say where or when this occurred. (RT 4142.)

The court ruled that there was an insufficient foundation to admit this evidence, finding that there were no other details other than the victims were in a car which connected the described act to the homicides in this case. (RT 4142-4144.) The prosecutor agreed [sic] that the scenario described was not unique, but defense counsel objected that there were sufficient details connecting the incident to the Bells and that the jury should be allowed to determine the weight of the evidence if they did not believe that there were adequate similarities. (RT 4144-4145.) In making this ruling, the court ignored the additional similarities, including that the victims description fit that of the Bells and the manner of death was also identical to the prosecutor's theory of the Bell homicide.

The court's exclusion of this evidence as not adequately connected to the homicides in question was incorrect and highly prejudicial. Maples' description of the incident was very close to what the prosecutor argued had happened to the Bells and was also the most descriptive evidence presented by the defense to connect Hurtz with the Bell homicide.

This court should hold that in combination with the other evidentiary errors made in this case and the obviously hard time the jury had reaching a verdict, the refusal to allow the defense to present additional evidence that Tony Hurtz confessed to committing these crimes, raises questions about the reliability of this verdict and requires reversal of appellant's convictions.

**B. Legal Principles**

As the trial court had already determined that the defense was entitled to present a third party culpability defense, and allowed it to present the testimony of other witnesses to the effect that both Hurtz and Borelli had admitted some involvement in the Bell homicides to various people, its ruling on the admissibility of Maples' testimony does not depend on whether such a defense was permissible. (*See People v. Cudjo, supra,* 6 Cal.4th at 609, citing *People v. McAlpin* (1991) 53 Cal.3d 1289, 1310, fn. 15.) Further the strength and credibility of the third-party-culpability evidence "is properly the province of the jury." (*People v. Hall, supra,* 41 Cal.3d at p. 834, cited in *People v. Cudjo, supra,* 6 Cal.4th at 610.)

Thus, the court erred in holding that there were insufficient factual similarities between the incident in which Maples overheard Hurtz was overheard describe [sic] a killing and the Bell homicides. The prosecutor's claim that this incident was not unique stretched credibility for several reasons. Hurtz's description of shooting a man and a woman while they were sitting in a car, and of shooting the woman and reaching over to then shoot the man is an exact description of the way in which the prosecutor's other witnesses described the homicide and the prosecutor himself argued the Bell homicide occurred. Additionally, because there was no evidence that there was any other incident that he could have been referring to, and also in light of the fact that other witnesses had heard Hurtz make similar statements referring to the Bells.

Whether Maples heard enough of the conversation to convince a jury that it occurred, and whether it was

referring to the Bells or some other extremely similar homicide (of which there was no evidence) was a jury question, not a matter for the court to reach in determining whether to allow the defense to present this evidence.

Therefore, just as in *Cudjo,* where the court based its decision to exclude a party's testimony for similarly improper reasons (in that case because the court determine [sic] that it did not believe the witness who would have testified to the third party's confession), the court committed error in excluding Maples's testimony. (*People v. Cudjo, supra,* 6 Cal.4th at 610.)

### C. Prejudice

In *Cudjo,* the Supreme Court found that the court had erred in excluding defense testimony, but refused to find that the error was of constitutional magnitude. Over a vigorous dissent from Justice Kennard, the court ruled that the *Watson*[34] standard should be applied in determining prejudice. The court reasoned that a trial court is given discretion to rule on the admissibility of evidence, and every time a court improperly exercises that discretion under a "normal rule" it should not be found to have violated the federal constitution. (*People v. Cudjo, supra,* 6 Cal.4th at pp. 611.) The court supplied no analysis of its holding, and Justice Kennard's dissent pointed out that in exercising that discretion in Cudjo's trial the court had "unconstitutionally invaded the jury's function and denied defendant his right, under the compulsory process clause of the Sixth Amendment, to present witnesses in his behalf." (*People v. Cudjo, supra*, 6 Cal.4th at 611.)

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[34] *People v. Watson* (1956) 46 Cal.2d 818, 836.

Thus, with all due respect, the majority's analysis of the federal constitutional right to present a defense makes no sense and does not apply to the facts that were before it. The court cited numerous cases and their factual and procedural predicates to support its determination

> that the constitutional right to present and confront material witnesses may be infringed by *general rules of evidence or procedure* which preclude material testimony or pertinent cross-examination for arbitrary reasons, such as unwarranted and overbroad assumptions of untrustworthiness. However, the high court *has never suggested that a trial court commits constitutional error whenever it individually assesses and rejects a material defense witness as incredible.*

(*Ibid.*, emphasis added.)

The majority did acknowledge that the court had found in *Delaware v. Van Arsdall* (1986) 475 U.S. 673, that the court's preclusion of cross-examination for bias, based upon individual assessment of probative value against prejudice, violated the confrontation Clause. (*Id.* At 611.)

However, as Justice Kennard pointed out, the Supreme Court's analysis of the right to present defense witnesses as guaranteed by the compulsory process clause, only allows restrictions of that right which "'accommodate other legitimate interests in the criminal trial process'" and are not "arbitrary or disproportionate to the purposes they are designed to serve." (*Rock v. Arkansas, supra,* 483 U.S. 44.)

Justice Kennard then went on to disagree with the majority's analysis that a particular application of a

statute which resulted in depriving the defendant of the opportunity to present a witness where that restriction "was *not* reasonably necessary to further any legitimate governmental interest" was not a constitutional violation of the defendant's right to present a defense. *(People v. Cudjo, supra,* 6 Cal.4th at 610.) Justice Kennard found that the Sixth Amendment protection was violated when the trial court acted to prevent a witness from testifying, as was done in both this case and in *Cudjo,* and not merely when a State has passed a law which prevents defense evidence.

> Finally, I reject the majority's suggestion that there was no constitutional violation in this case because the defendant's witness was barred from testifying, not by a state statute or rule of evidence, but as a result of the trial court's erroneous application of state law. The suggestion amounts to an odd distortion of the nature and purpose of the constitutional guarantee. *What the state and federal Constitutions secure for the accused is the right to present a defense, not merely the right to be free of unduly restrictive state laws of evidence and procedure.* When, in this case, a crucial defense witness was not permitted to testify, defendant was denied that fundamental right.

(*Id.* At 641, emphasis added.) Justice Kennard went on to note that the *Chapman* test applied to the exclusion of defense testimony (*Ibid*, relying on *Crane v. Kentucky* (1986) 476 U.S. 683, and *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.) The appropriate inquiry under that standard is:

> "not whether, in a trial that occurred without the error, a guilty verdict would surely have been

> rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. ___, ___ [124 L.Ed.2d 182, 189, 113 S.Ct. 2078, 2081], original italics.)

(*People v. Cudjo, supra,* 6 Cal.4th at 642, Kennard, J., dissenting.)

In this case, an application of the *Chapman* standard will surely require reversal of appellant's convictions. As argued above (See Argument I, *ante),* this case was so close that there were three jury trials, and in this case, even with a jail house informant claiming that appellant had confessed and with the newly discovered gun which a prosecution expert claimed was the murder weapon, it took the jury five weeks to reach a guilty verdict. During that time they reported themselves deadlocked once and had their foreperson resign. They specifically asked the court questions indicating that they were considering the third party culpability evidence, including questions about the sighting of the various vehicles at the scene (See questions of May 5 and 31 [Stelzner and Peer]; May 11 [Tavares]; May 12 [Daraskovich];) autopsy evidence (May 11, Pettingill and Lipton; possession of appellant's gun (May 15, part 3 of request for appellant testimony) and ballistics evidence identifying appellant's gun as the murder weapon (May 23, Saggs and Morton testimony).

Not only because the testimony of an additional witness, and one related to Hurtz who did not know appellant, and whose testimony therefore would not be impeachable by evidence of a motive to assist appellant at Hurtz's expense (such as was present for many of the other witnesses such as BJ and Cynthia Caswell especially), and without any evidence of personal animosity towards Hurtz

(such as existed for the Eitreims and Hurtz's other girlfriends[)], it simply cannot be said that the verdict rendered "was *surely unatrributable* to the error."

Finally, because this case was so close and because of the factors outlined above, this error, in combination with the other evidentiary and procedural errors committed by the court, even under the *Watson* test, this verdict is suspect. Under *Watson,* this court must determine whether it is reasonably probable that admission of the testimony would have affected the outcome. As outlined above, because this case was so close and so difficult for the jury to decide, it cannot be said that it is not reasonably probable that the testimony of this witness who also heard Hurtz confess to these killings would not have altered the outcome of this case.

Reversal is required.

* * *

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No. 06-5247

# In the Supreme Court of the United States

JOHN FRANCIS FRY, PETITIONER

*v.*

CHERYL K. PLILER, WARDEN

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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## QUESTION PRESENTED

The United States will address the following question:

Whether the "substantial and injurious effect" harmless-error standard for constitutional trial errors adopted in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), for habeas proceedings under 28 U.S.C. 2254 applies regardless of whether the state appellate court recognized the constitutional error and reviewed it for harmlessness under *Chapman* v. *California*, 386 U.S. 18 (1967).

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

### INTEREST OF THE UNITED STATES

This case presents the question whether the harmless-error standard for constitutional trial errors set out in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), for habeas proceedings under 28 U.S.C. 2254 applies whether or not the state appellate courts recognized the constitutional error and reviewed it under the harmless-error standard of *Chapman* v. *California*, 386 U.S. 18 (1967). Although this case arises from a habeas petition filed by a state prisoner pursuant to Section 2254, the question presented also arises in cases brought by federal prisoners pursuant to 28 U.S.C. 2255, when an intervening change in the law prompts a federal prisoner to raise in a Section 2255 motion a constitutional claim that was either not raised or found to be meritless on direct re-

view.[1] Because the question presented implicates the harmless-error standard applicable to constitutional trial errors asserted in Section 2255 proceedings, the United States has a substantial interest in its correct resolution.

## STATEMENT

1. In the early morning of October 27, 1992, the bodies of James and Cynthia Bell were discovered in a vehicle parked on the shoulder of Interstate 505 in northern California. Cynthia, who was seated on the driver's side, had been shot in the head. James, who was seated in the front passenger seat, had been shot eight times in his head, chest, back and wrist. J.A. 26-27. At least four witnesses saw an older-model pickup truck with a light-colored camper shell parked at the crime scene next to the victim's car during the evening of October 26, 1992. J.A. 28. Petitioner was charged with the murders. After his first two trials ended in hung juries, petitioner was convicted of both murders at his third jury trial and sentenced to life imprisonment without the possibility of parole. J.A. 67-68.

Numerous witnesses testified at petitioner's trial that Cynthia owed petitioner money for drugs, and that petitioner had been angered when he caught her roaming about his house, because he believed she was trying

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[1] See, *e.g.*, *United States* v. *Dago*, 441 F.3d 1238, 1245-1246 (10th Cir. 2006); *United States* v. *Owen*, 407 F.3d 222, 229 (4th Cir. 2005), cert. denied, 126 S. Ct. 1026 (2006); *United States* v. *Rivera*, 347 F.3d 850, 852 (10th Cir. 2003), cert. denied, 540 U.S. 1210 (2004); *United States* v. *Montalvo*, 331 F.3d 1052, 1057-1058 (9th Cir. 2003), cert. denied, 541 U.S. 1011 (2004); *Ross* v. *United States*, 289 F.3d 677, 682 (11th Cir. 2002) (per curiam), cert. denied, 537 U.S. 1113 (2003); *Santana-Madera* v. *United States*, 260 F.3d 133, 140 (2d Cir. 2001), cert. denied, 534 U.S. 1083 (2002); *Murr* v. *United States*, 200 F.3d 895, 906 (6th Cir. 2000).

to steal from him. At least three witnesses testified that they heard petitioner threaten to kill Cynthia in the days immediately preceding the murders. Several witnesses, including petitioner's brother, testified that when petitioner returned home on the night of the murders, he was spotted with blood. Petitioner's handgun also had blood on it and contained four spent shells.[2] That same night, petitioner made incriminating statements to his brother and several other witnesses, saying he "did" Cynthia and James Bell and describing in vivid detail the impact of a .357 magnum bullet on a human head. Expert testimony established that one of the bullets recovered from the victims had definitely been fired from petitioner's gun. When the police attempted to take petitioner into custody, he fled from the police in a high-speed chase. He confessed to another inmate that he had committed the murders, and tried to arrange to have his brother injured in order to persuade him to change his testimony. J.A. 71.

Petitioner testified at trial. While denying that he committed the murders, petitioner admitted that at the time of the murders he owned a 1977 powder blue pickup truck with a white camper shell and a .357 magnum. He admitted that Cynthia Bell dealt drugs for him and owed him money at the time she was murdered. Petitioner further admitted driving an acquaintance—who had testified that petitioner believed she (the acquaintance) had stolen money from him and had threatened to kill her (J.A. 29)—into the country two days before the murders, taking out his gun and shooting it twice out the window.

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[2] The State also presented testimony that petitioner sat in his truck for some time before entering the house and that once he came inside, petitioner went into the bathroom, from which the sound of running water was heard. J.A. 37.

He admitted that when he arrived home on the night of the murders, he "pulled into the driveway and sat there for a while," "trying to maintain control" and "get a focus." J.A. 53. Petitioner admitted going into the bathroom upon entering the house, but denied changing his clothes or having blood on them. He admitted that he removed the camper shell from his pickup truck the morning after the murders, but claimed that he did so to save gas mileage. Petitioner also admitted lying to the police when asked when he had last seen his .357. Finally, while petitioner did not admit that he had arranged to have an inmate harm his brother, petitioner admitted that he gave the inmate his brother's address. J.A. 49-55.

2. At trial, petitioner sought to establish that one or more other individuals committed the murders, including Anthony Hurtz. He introduced evidence that Hurtz had admitted his involvement to several witnesses. See J.A. 61-64. The trial court excluded the testimony of an additional witness, Pamela Maples, that she overheard Hurtz state that he committed murders that resembled the circumstances of the murder of the Bells. J.A. 17.

Maples testified at trial that, while at her sister's house in Vallejo in April 1994, she "overheard" Hurtz discussing some homicides. The prosecution objected to the testimony, and the defense made an offer of proof. Maples testified outside the presence of the jury that, during a conversation among her sister, Hurtz, and "a guy named Steve," she heard Hurtz state that he had killed a man and a woman in a car. Maples was "in and out of the room" at the time, only heard "bits and pieces" of the conversation, and did not participate in it. The conversation was already underway when she came in, and she did not know how long the participants dis-

cussed the murders, the context of the discussion, or whether the discussion was "serious" or not. Maples testified that Hurtz said that he shot the girl in the head first and then reached over and shot the guy. Hurtz said the victims were in a parking place, but he did not describe either the location of the murders or the type of car the victims were in. Maples further testified that Hurtz stated that he was "full of blood" after the murders, and that he ran through a field, threw mud on himself, and phoned someone to pick him up. Maples did not hear Hurtz state when the murders took place. Under cross-examination, Maples acknowledged that she had no idea whether the murders about which Hurtz spoke took place one week or ten years before the conversation, or whether they occurred in California or elsewhere. The trial court sustained the State's objection to this testimony, concluding that the defense had provided insufficient evidence to connect the incident described by Hurtz to the murder of the Bells. J.A. 7-17, 94-95.

3. Petitioner took an appeal to the California Court of Appeals, contending, among other things, that the exclusion of Maples's testimony violated his constitutional right to present a defense and to a fair trial. The court of appeals concluded that the trial court did not abuse its discretion in excluding the testimony. The court explained that, "[g]iven the absence of any actual linkage to the charged offenses, or any other evidence supporting an inference that the killings allegedly described by Hurtz were those of Cynthia and James Bell, Maples' testimony simply did not tend to show [petitioner's] innocence." J.A. 97. The court added that "no possible prejudice" could have resulted from the exclusion of the evidence because Maples's testimony was "cumulative" of the testimony of other defense witnesses

that Hurtz had confessed to shooting two unidentified people at close range while the victims were seated in a parked car. J.A. 97 n.17. In finding that the exclusion of the testimony was nonprejudicial, the court did not specify the harmless-error standard it was applying. Thereafter, petitioner filed a petition for review in the Supreme Court of California, which was denied. J.A. 113. Petitioner did not file a petition for a writ of certiorari seeking direct review of his conviction.

4. Petitioner moved in the United States District Court for the Eastern District of California for a writ of habeas corpus under 28 U.S.C. 2254. J.A. 114. He raised several issues, including the exclusion of Maples's testimony at his trial. The magistrate judge concluded that the exclusion of Maples's testimony violated the Sixth and Fourteenth Amendments because "the evidence of third-party culpability . . . . was sufficiently 'crucial or reliable' to outweigh the state's interest in exclusion of untrustworthy evidence." J.A. 180 (citing *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *Washington* v. *Texas*, 388 U.S. 14 (1967)). The magistrate judge explained that, "[a]lthough the offer of proof regarding Maples is in parts imprecise, certain significant points match or closely parallel some of the key circumstances of the case at issue"—to wit, "[b]oth victims had been shot to death; victim Cynthia Bell had been shot in the head; the victims were in a car, parked in a turnout area; evidence showed she was in the driver's seat and James Bell was in the passenger seat and that the shooter was standing outside the vehicle's driver side; testimony revealed that the shooter would have been covered in blood." J.A. 179. The magistrate judge also took issue with the state appellate court's statement that no other evidence supported the inference that Hurtz had described the mur-

der of the Bells, observing that seven other witnesses "specifically link[ed] Hurtz to the deaths of the Bells." *Ibid.* The magistrate judge held that "[f]or the state appellate court not to recognize the trial court's error was an unreasonable application of clearly established law as set forth by the Supreme Court." J.A. 180.

The magistrate judge then addressed whether the constitutional error was harmless. J.A. 180-182. The magistrate judge concluded that the error was harmless under the standard set forth in *Brecht* v. *Abrahamson*, 507 U.S. 619, 623 (1993), under which an error is deemed harmful if it "had substantial and injurious effect or influence in determining the jury's verdict." See J.A. 180 (quoting *Brecht*). Although the magistrate judge did not agree with the state appellate court that "no possible prejudice" could have resulted from the exclusion of Maples's testimony, he found that there had been an "insufficient showing" that the exclusion of the testimony had a "substantial and injurious effect" on the verdict. J.A. 181-182. The magistrate judge explained that the jury heard other defense witnesses implicate Hurtz in the murders in "far more damning detail" and that Maples's testimony "could not have emerged completely unscathed by a cross-examination that would have pointed up [its] infirmities." J.A. 181. Having thus found the constitutional error to be harmless, the magistrate judge recommended that habeas relief be denied. J.A. 182.

The district court conducted a de novo review of the case, adopted the findings and recommendations of the magistrate judge, and denied the habeas petition. J.A. 208-209.

5. Petitioner took an appeal to the Ninth Circuit. That court agreed with the district court that the exclu-

sion of Maples's testimony entailed an unreasonable application of clearly established federal law because the testimony was "material and would have substantially bolstered [petitioner's] claims of innocence." J.A. 212 (quoting *Chia* v. *Cambra*, 360 F.3d 997, 1003 (9th Cir. 2004)). The court, however, also agreed with the district court that the error was harmless under the *Brecht* standard. *Ibid.* The court rejected petitioner's claim that the *Brecht* harmless-error standard was inapplicable because the state appellate court had "failed to conduct a meaningful prejudice review." J.A. 212 n.3. The court explained that, under its decisions, "the *Brecht* standard applies uniformly in all Federal habeas corpus cases under § 2254 regardless of the error standard, if any, applied by the state court." *Ibid.* (citing *Bains* v. *Cambra*, 204 F.3d 964, 976 (9th Cir.), cert. denied, 531 U.S. 1037 (2000), and *Inthavong* v. *LaMarque*, 420 F.3d 1055, 1059 (9th Cir. 2005), cert. denied, 126 S. Ct. 1660 (2006)).

Judge Rawlinson dissented. J.A. 213-214. Applying the *Brecht* standard, Judge Rawlinson concluded that the exclusion of Maples's testimony was not harmless. J.A. 214.

## SUMMARY OF ARGUMENT

Harmless-error review under the standard set out in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), applies in a federal habeas proceeding under 28 U.S.C. 2254 whenever the court finds a constitutional trial error, regardless of whether the state appellate courts reviewed that error under the harmless-error standard of *Chapman* v. *California*, 386 U.S. 18 (1967). *Brecht* adopted the less onerous harmless-error standard of *Kotteakos* v. *United States*, 328 U.S. 750 (1946), for federal constitutional trial errors asserted in habeas proceedings under 28

U.S.C. 2254 because of concerns about finality and federalism. The scope and rationale of the Court's opinion justify the application of the *Brecht* standard across the board.

Petitioner contends that *Brecht*'s scope is limited to cases in which the state appellate court had found (as the Wisconsin Supreme Court had in *Brecht*) the constitutional error to be harmless beyond a reasonable doubt under *Chapman*. Petitioner's contention lacks merit.

First, the majority opinion in *Brecht* made clear that it found the *Chapman* standard unsuitable for collateral review for a number of reasons, none of which related to the content of the state appellate court's legal determinations. The Court mentioned only one possible exception to its "hold[ing] that the *Kotteakos* harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type," 507 U.S. at 638 (footnote omitted), and that potential exception (for intentional errors) does not turn on the nature of the state courts' appellate review and is far more narrow than the one for which petitioner advocates.

Second, all the reasons the *Brecht* Court identified for rejecting *Chapman* on collateral review apply with the same force to cases in which the state courts on direct appeal did not conduct *Chapman* review. The *Brecht* Court first cited the States' interest in the finality of their criminal judgments. That interest arises regardless of the precise content of the state appellate courts' legal determinations in upholding the conviction. The *Brecht* Court next cited the intrusion federal habeas review visits on "the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." 507 U.S. at 635 (quoting *Engle* v. *Isaac*,

456 U.S. 107, 128 (1982)). The federal habeas courts' infringement on state sovereignty is no less severe in cases in which the state courts found no federal constitutional error. The *Brecht* Court also cited the historic purpose of the writ to provide relief only to those prisoners "grievously wronged." *Id.* at 637. A state prisoner is no more or less "wronged" by a state court decision erroneously finding no constitutional error than he is by a state court decision erroneously determining that the error was harmless. Finally, the Court cited the "social costs" of granting habeas relief, *ibid.*, pointing out, among other things, the difficulties in retrying defendants many years after the case was brought. Those costs do not vary based on the reason the state courts denied relief.

Petitioner's proposed approach not only finds no support in *Brecht*, but it would also produce inequitable results. Similarly situated prisoners whose constitutional rights were violated should not face different outcomes in a Section 2254 proceeding as a result of the state appellate courts making different errors in their cases, one with respect to whether there was a constitutional error at all, and the other with respect to whether the error was harmless under *Chapman*. Petitioner's approach would also be difficult to administer in practice, because a state court will often not make clear what harmless-error standard it is applying. This case itself—in which the state appellate court found "no possible prejudice" (J.A. 97 n.17)—illustrates that point.

Because the court of appeals here correctly applied *Brecht* rather than *Chapman* and correctly concluded that the error in excluding Maples's testimony did not have a "substantial and injurious effect or influence in determining the jury's verdict," 507 U.S. at 623 (quoting

*Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)), its judgment should be affirmed.

## ARGUMENT

### A STATE PRISONER IN A HABEAS PROCEEDING UNDER 28 U.S.C. 2254 MAY NOT OBTAIN RELIEF FOR A CONSTITUTIONAL TRIAL ERROR UNLESS IT HAD A SUBSTANTIAL AND INJURIOUS EFFECT ON THE JURY'S VERDICT

In *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), this Court held that a state prisoner seeking a writ of habeas corpus under 28 U.S.C. 2254 cannot obtain relief on the basis of a federal constitutional trial error unless that error "had substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 631 (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)). In adopting the *Kotteakos* standard, which the Court had established for review of non-constitutional errors on direct appeal from federal convictions, see *id.* at 764-765, the *Brecht* Court expressly rejected applying the harmless-error standard of *Chapman* v. *California*, 386 U.S. 18 (1967), under which a constitutional trial error triggers reversal of a conviction on direct appeal unless the error "was harmless beyond a reasonable doubt," *id.* at 24. The *Brecht* Court chose the "less onerous" *Kotteakos* standard because "the costs of applying the *Chapman* standard on federal habeas outweigh the additional deterrent effect, if any, that would be derived from its application on collateral review." 507 U.S. at 636-637.

Following *Brecht*'s teaching, the court of appeals here applied the *Kotteakos* standard and concluded that the constitutional error was harmless. J.A. 212. Petitioner contends (Br. 24-27) that the court of appeals erred in applying that standard because in *Brecht*, un-

like here, the state appellate court applied *Chapman* on direct review, and *Brecht*'s holding and rationale are limited to that circumstance. As we explain below, petitioner's contention lacks merit.

### A. *Brecht* Is Not Limited To Habeas Cases In Which A State Court Applied *Chapman* Review On Direct Appeal

In *Brecht*, the Court addressed whether the Seventh Circuit on collateral review correctly applied the *Kotteakos* harmless-error standard rather than the *Chapman* harmless-error standard to the violation of the petitioner's due process right under *Doyle* v. *Ohio*, 426 U.S. 610 (1976), not to have his post-*Miranda*[3] silence used against him at his trial. In deciding that the Seventh Circuit was correct to apply the *Kotteakos* standard, the Court explained that "[t]he imbalance of the costs and benefits of applying the *Chapman* harmless-error standard for collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error." *Brecht*, 507 U.S. at 637. The Court further explained that the "less onerous [*Kotteakos*] standard" was "better tailored to the nature and purpose of collateral review and more likely to promote the considerations underlying our recent habeas cases." *Id.* at 637-638. Those observations prompted the Court to "hold that the *Kotteakos* harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type." *Id.* at 638 (footnote omitted).

The categorical nature of the Court's observations and holding refutes petitioner's assertion (Pet. Br. 24-27) that the Court adopted a standard for collateral review of constitutional error that would apply only when

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[3] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

a state court on direct review recognized that error and reviewed it for harmlessness under *Chapman*'s standard. The *Brecht* Court held out the possibility that the *Kotteakos* standard might not apply "in an unusual case" in which "a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." 507 U.S. at 638 n.9. That potential exception does not aid petitioner, however, because it is focused on the conduct of the trial and does not turn on the nature of the state courts' appellate review. In addition, petitioner's proposed approach would limit *Brecht*'s application in a much more radical way that finds no support in the decision.

Petitioner cites for support (Pet. Br. 23) a single passage in *Brecht*:

> State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. For these reasons, it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review.

507 U.S. at 636 (citation omitted). That passage does not support petitioner's contention that *Brecht* applies only in cases in which a state court applied *Chapman* on direct review. The Court's observation about a state court's capacity to identify and evaluate constitutional errors is a general one that applies regardless of what

specific determinations a state court actually makes in any given case. Indeed, nothing in the passage suggests, let alone establishes, that a state court's application of *Chapman* is a *prerequisite* to application of the *Kotteakos* standard on federal collateral review. Rather, the point is that a federal court in a Section 2254 proceeding is not similarly situated to a state appellate court directly reviewing a state conviction and thus should not apply the harmless-error standard that the Constitution "*requires*" the state appellate court to apply, whether or not the state court in fact found any constitutional error or, if it did, explicitly applied *Chapman* in the particular case.

The categorical nature of the majority's holding is confirmed by all of the Justices who wrote separately. Neither Justice Stevens, who authored a concurring opinion, nor the dissenting Justices read the majority opinion to be limited to cases in which *Chapman* review was applied by the state courts. See *Brecht*, 507 U.S. at 643 (Stevens, J., concurring) (referring to the "*Kotteakos* standard that will now apply on collateral review" of state convictions); *id.* at 644 (White, J., dissenting) ("If * * * the state courts erroneously concluded that *no violation had occurred* or (as is the case here) that it was harmless beyond a reasonable doubt, * * * the majority would foreclose relief on federal habeas review" when the petitioner's conviction was "tainted by a constitutional violation that, while not harmless beyond a reasonable doubt, did not have 'substantial and injurious effect or influence in determining the jury's verdict.'" (emphasis added) (quoting *Kotteakos*, 328 U.S. at 776); *id.* at 651 (O'Connor, J., dissenting) (observing that, under the majority decision, *Chapman* "no longer applies to *any* trial error asserted on habeas").

Consistent with *Brecht*'s clear holding, the Court's subsequent decisions have applied *Brecht* categorically. This Court's decision in *Penry* v. *Johnson*, 532 U.S. 782 (2001), is illustrative, confirming that the *Brecht* standard applies even when a state court does not conduct *Chapman* review. In *Penry*, the Texas Court of Criminal Appeals had rejected on the merits the petitioner's Fifth Amendment claim that the admission of a psychiatrist's report violated his Fifth Amendment privilege against self-incrimination and thus had no occasion to conduct harmless-error review. Although the Court ruled first that the Texas court's rejection of the petitioner's Fifth Amendment claim was not "objectively unreasonable," *id.* at 795, under 28 U.S.C. 2254(d)(1), the Court held in the alternative that, assuming a Fifth Amendment violation, "that error would justify overturning [the petitioner's] sentence only if [he] could establish that the error 'had substantial and injurious effect or influence in determining the jury's verdict,'" *ibid.* (quoting *Brecht*, 507 U.S. at 637 (quoting *Kotteakos*, 328 U.S. at 776)). The Court concluded that, under *Brecht*, it could not disturb the state court's rejection of the Fifth Amendment claim, because it had "considerable doubt" that admission of the report "had a 'substantial and injurious effect' on the verdict." *Penry*, 532 U.S. at 796 (quoting *Brecht*, 507 U.S. at 637). *Penry* thus makes clear that *Brecht* applies to cases in which the state appellate courts did not conduct *Chapman* review because they found no constitutional error.[4]

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[4] In *Mitchell* v. *Esparza*, 540 U.S. 12 (2003) (per curiam), the Court held that, in cases where the state courts have in fact found a constitutional error harmless, habeas relief may be obtained under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, only when the state court's "conclusion

*Calderon* v. *Coleman*, 525 U.S. 141, 143-146 (1998) (per curiam), also indicates that whether the state appellate court applied *Chapman* has no bearing on the applicability of the *Kotteakos* standard on collateral attack. There, the California Supreme Court found that a jury instruction violated *state* law but concluded that the error was not prejudicial, without specifying the harmless-error standard. *Id.* at 143; see *People* v. *Coleman*, 759 P.2d 1260, 1281-1282 (Cal. 1998). On habeas review, the Ninth Circuit held that the instructional error violated the *federal* Constitution and was not harmless under

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[that the error was harmless] was * * * objectively unreasonable." *Id.* at 18. Two circuits have read *Esparza* to implicitly reject *Brecht* in circumstances in which the state courts have concluded that the error was harmless. See *Eddleman* v. *McKee*, 471 F.3d 576, 583 (6th Cir. 2006) ("AEDPA replaced the *Brecht* standard with the standard of *Chapman* plus AEDPA deference when * * * a state court made a harmless-error determination."); *Gutierrez* v. *McGinnis*, 389 F.3d 300, 306 (2d Cir. 2004) ("The Supreme Court [in *Esparza*] implicitly rejected *Brecht* as the proper lens for examining the harmlessness of constitutional errors on collateral review, at least where the state explicitly adjudicated a federal claim on harmless error grounds."). *Esparza*, however, concluded that the state court's harmless-error decision was *not* "objectively unreasonable," 540 U.S. at 18, and the Court thus had no occasion to decide whether the *Brecht* test also had to be satisfied to warrant habeas relief. Other circuits have continued to require that a federal constitutional error meet the *Brecht* standard before granting habeas relief under AEDPA in cases where the state courts found the error harmless. See *Inthavong* v. *LaMarque*, 420 F.3d 1055, 1061 (9th Cir. 2005) ("[B]oth the *Brecht* and the AEDPA/*Esparza* tests must be satisfied with respect to harmless error before relief can be granted."), cert. denied, 126 S. Ct. 1660 (2006); *Jones* v. *Polk*, 401 F.3d 257, 264-266 (4th Cir. 2005) (finding that the state court unreasonably applied *Chapman* but that the error did not have a substantial and injurious effect on the jury's verdict). In all events, *Brecht* would continue to govern cases, like *Penry*, where the state courts did not reach the harmless-error issue and all proceedings under 28 U.S.C. 2255.

*Boyde* v. *California*, 494 U.S. 370, 380 (1990). This Court assumed that there was constitutional error and ruled that the Ninth Circuit erred in failing to apply *Brecht*'s "substantial and injurious effect" standard in determining whether that error was harmless. *Coleman*, 525 U.S. at 145. Without inquiring into whether the state court's application of harmless-error principles to the state law violation amounted to or substituted for harmless-error review of the analogous federal claim under the *Chapman* standard, the Court explained that "once the [Ninth Circuit] determined that the giving of the [jury] instruction was constitutional error, it was bound to apply the harmless-error analysis mandated by *Brecht*." *Id.* at 146.[5]

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[5] Similarly, in *O'Neal* v. *McAninch*, 513 U.S. 432 (1995), the Court applied the *Kotteakos* standard adopted in *Brecht*, even though the state appellate court, having found no constitutional error, did not apply *Chapman* review. See Resp. Br. at 4, *O'Neal*, *supra* (No. 93-7407) (noting that the state appeals court "reject[ed] [the] [p]etitioner's claims" and held "that the challenged instructions were in accord with Ohio law"). See also *Tuggle* v. *Netherland*, 516 U.S. 10, 15 (1995) (Scalia, J., concurring) (because the state appellate court failed to perform its task of "determining whether there was reasonable doubt as to whether the constitutional error contributed to the jury's decision, * * * a remand is appropriate to allow the Fourth Circuit to review the case under the harmless-error standard appropriate to collateral review," citing *Brecht*); *Duncan* v. *Henry*, 513 U.S. 364, 371-372 & n.1 (1995) (Stevens, J., dissenting) (stating, in a case in which the state court, on direct appeal, had applied a variant of the *Kotteakos* standard in reviewing a due process violation for harmless error, that "the *Brecht* standard would apply in the federal habeas proceeding"). The Court's more recent statements about *Brecht* reflect the same view. See *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81 n.7 (2004) ("When the government has the burden of showing that constitutional trial error is harmless because it comes up on collateral review, the heightened interest in finality generally calls for the Government

### B. The *Brecht* Court's Rationale For Rejecting *Chapman*'s Standard Applies Regardless Of Whether The State Courts Found A Constitutional Violation Or Applied *Chapman*

The *Brecht* Court identified several reasons for requiring federal courts on collateral review to apply a harmless-error standard "less onerous" (507 U.S. at 637) than *Chapman*, and none of them turns on the state court having found a constitutional violation and then having found it harmless under *Chapman* on direct review. The *Brecht* Court rejected the petitioner's argument that applying the *Chapman* standard on collateral review was necessary to deter state courts from overlooking constitutional errors and prosecutors from committing them. The Court concluded that "the costs of applying the *Chapman* standard on federal habeas outweigh the additional deterrent effect, if any, that would be derived from its application on collateral review." 507 U.S. at 636.

First, the Court concluded that applying *Chapman* would "undermine[] the States' interest in finality." *Brecht*, 507 U.S. at 637. That finality interest is equally robust when the state appellate courts have concluded that the petitioner's trial was free of constitutional error as when they have found constitutional error but concluded that it was harmless under *Chapman*. In either case, the state courts have decided that the conviction should not be disturbed, and it is that ultimate decision, as opposed to a subsidiary appellate legal determination, that triggers the "presumption of finality" that "atta-

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to meet the more lenient *Kotteakos* standard.") (citing *Brecht*); *United States* v. *Vonn*, 535 U.S. 55, 63 (2002) (citing *Brecht* as "the variant of harmless-error review applicable on collateral attack").

ches to the conviction and sentence." *Id.* at 633. Thus, the cost that collateral review imposes on the State's interest in finality is as high in the context presented here as it was in *Brecht*.[6]

Second, the Court found that applying *Chapman* would "infringe[] upon [the States'] sovereignty over criminal matters." *Brecht*, 507 U.S. at 637. Petitioner contends (Pet. Br. 25) that the "comity concerns" that arise when a federal court repeats the approach taken by the state courts "do not exist" when the state courts fail to apply *Chapman*. State court determinations concerning the *federal* harmless-error standard do not lie any closer to the core of state sovereignty (or otherwise

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[6] The California Court of Appeals held in the alternative that, even assuming the exclusion of Maples's testimony was an abuse of discretion, "no possible prejudice could have occurred," because her testimony was "merely cumulative." J.A. 97 n.17. Thus, the state appellate court did conclude, in the alternative, that any error was harmless. Had the court invoked the *Chapman* standard, it is unclear whether petitioner would view this case as subject to *Brecht*. See J.A. 212 n.3. It also is unclear why, even under petitioner's approach, a state court should have to invoke *Chapman* expressly when the finding that it made—*i.e.*, "no possible prejudice"—is tantamount to a finding of harmlessness under *Chapman*'s phraseology "harmless beyond a reasonable doubt." 386 U.S. at 24. See *ibid.* (observing that "[t]here is little, if any, difference between [the harmless beyond a reasonable doubt standard and] our statement in *Fahy* v. *Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction'"). See, *e.g.*, *Richardson* v. *Bowersox*, 188 F.3d 973, 979 (8th Cir. 1999) (observing that Missouri Supreme Court's review of constitutional claim for prejudice and its conclusion that "the jury's verdict would have been no different if [the] out-of-court statement had been excluded" might qualify as *Chapman* review). Certainly, if the standard required by *Chapman* (or an even more defendant-protective standard) is, in fact, applied, it could be neither error nor a basis for rejecting *Brecht* for a court simply to omit a citation to *Chapman*.

implicate the State's comity interests) than any other application of federal law by state courts. Contrary to petitioner's suggestion, the States have a sovereign interest in protecting judgments of conviction obtained in their criminal courts, regardless of the specific determinations that their appellate courts may have made in upholding them. When the *Brecht* Court referred to the States' "sovereignty over criminal matters," 507 U.S. at 637, it meant the States' sovereign interest in protecting "final and presumptively correct *convictions*" for violations of state criminal law, *ibid.* (emphasis added), not some discrete state appellate legal determination concerning federal law. See *id.* at 635 ("Federal intrusions into state criminal *trials* frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.") (emphasis added) (quoting *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982)).

Third, the Court in *Brecht* observed that applying *Chapman* "is at odds with the historic meaning of habeas corpus—to afford relief to those whom society has 'grievously wronged,'" *Brecht*, 507 U.S. at 637, because *Chapman* affords relief "merely because there is a reasonable possibility that trial error contributed to the verdict," *ibid.* (internal quotation marks omitted). In the *Brecht* Court's view, the "substantial and injurious effect" test better reflects the historical basis for awarding habeas relief because it requires "actual prejudice." *Ibid.* Here too, the likelihood of grievous wrong does not turn on whether the state appellate court found a constitutional error that was harmless under *Chapman* or no constitutional error at all. Grievous wrong can arise in either situation, but only *Brecht* and *Kotteakos*, not